CASES

ARGUED AND DETERMINED

IN

THE SUPREME COURT

OF

THE STATE OF MISSOURI,

FEBRUARY TERM, 1873, AT ST. JOSEPH.

CONTINUED FROM VOL. LI.

FARMERS AND MERCHANTS INSURANCE COMPANY, *ex rel.*, and to the use of WILLIAM H. BENNESON, Receiver, &c., Plaintiff in Error, *vs.* ELIJAH S. NEEDLES, Defendant in Error.

1. *Practice, civil—Note—Suit on—Allegation that plaintiff is a corporation, when necessary.*—In a suit by a corporation on a promissory note given to it in its corporate capacity by defendant, it is not ground of demurrer that plaintiff failed to allege that it was, at the date of the note, a corporation, etc. Defendant having entered into the contract with the company in its corporate name, thereby admitted it to be duly constituted a body politic and corporate.
2. *Receiver—Cannot sue, when.*—A receiver cannot sue in a foreign jurisdiction for the property of the debtor.

Error to Atchison Circuit Court.

A. H. Vories, for Appellant.

Defendant could not deny the legal existence of plaintiff as a corporation. (O. & M. R. R. Co. vs. McPherson, 35 Mo., 13; Jones vs. Cincinnati Type F. Co., 14 Ind., 89; Hubbard vs. Chappell, 14 Ind., 601.)

J. D. Campbell, for Defendant in Error.

Ewing, Judge, delivered the opinion of the court.

This is an action on a promissory note alleged to have been executed by defendant to plaintiff. An amended petition was filed which alleges substantially that the Insurance Company is a corporation duly incorporated under the laws of the State of Illinois, with power to sue and be sued, &c.; that W. H. Benneson was duly appointed receiver by the Circuit Court of Adams county in the State of Illinois, of all the rights, property and assets of the plaintiff in 1869, and gave bond which was duly approved, &c. That as such receiver he is in possession of the property and effects of said corporation. The petition then alleges the execution of the note by defendant to plaintiff, said corporation, and that said note is part of the assets and property which came to the hands of said receiver, and that the same is due and unpaid.

Defendant demurred to the petition assigning several grounds which may be resolved into the two following:

That it is not alleged in said petition that the Farmers & Merchants Insurance Company was a corporation and duly authorized to contract, sue and be sued, &c., on the 13th day of April, 1866, the day on which the note sued on was executed to the plaintiff by defendant.

That it is not alleged that plaintiff, the Insurance Company, made an assignment of all the rights, property and assets of the plaintiff to any person or persons prior to the alleged appointment of Benneson as receiver of said property.

The demurrer was sustained and final judgment rendered thereon.

1. The defendant having entered into the contract with the Insurance Company in its corporate name thereby admitted it to be duly constituted a body politic and corporate. (Ohio & M. R. R. Co. vs. McPherson, 35 Mo., 13, 26; The Dutchess Cotton Manufactory vs. Davis, 14 Johns, 238; Jones vs. Cincinnati Type F. Co., 14 Ind., 89; Hubbard vs. Chappell, *Id.*, 601.)The first point therefore is not well taken.

1. It is admitted by the demurrer that Benneson was duly appointed receiver, and as such is in possession of the property and effects of the corporation including the note in controversy. And as it does not appear by any averment in the petition, that the note has ever been assigned or transferred by the payee thereof, the corporation only can maintain an action thereon, unless the receiver as such has the right of action. A receiver cannot sue in a foreign jurisdiction for the property of the debtor. (Booth vs. Clark, 17 How., U. S., 322.)

Judgment reversed and cause remanded, the other Judges concur, except Judge Vories, who having been of counsel, did not sit.

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JOHN BRADY, Respondent, *vs.* JAMES H. CONNELLY, GEORGE W. SMITH AND JOHN CORRALL, Appellant.

1. *Practice, civil—Counts—Verdict, etc.*—The rule that where a petition contains more than one count, there should be a separate verdict on each count, only applies where the counts are for separate and distinct causes of action.
2. *New trial—Objections, not appearing—Result.*—Objections not raised on motion for new trial will not be considered by the Supreme Court.

Appeal from the Platte County Circuit Court.

Allen H. Vories, for Appellant.

J. E. Merryman, for Respondent.

ADAMS, Judge, delivered the opinion of the court.

This was an action for damages for throwing down the wall of plaintiff's store-house and thereby injuring his goods and house by negligently excavating the earth from below the foundation of his house.

A verdict and judgment were given for the plaintiff, and a motion for a new trial was made and overruled and exceptions duly saved; and defendants have appealed to this court.

1. The first point raised by the appellant here is that the verdict of the jury, being general, cannot stand; that there

were two counts in the petition and there should have been a separate verdict on each count. This rule only applies when the counts are for separate and distinct causes of action. There is no pretense here that there were several causes of action. It is conceded that there was but a single cause of action and although there are two counts in the petition, they are only separate statements of the same identical cause of action. The verdict therefore is right. (See Brownell vs. Pacific Railroad Company, 47 Mo., 239; Ranney vs. Bader, 48 Mo., 539; Newton vs. Miller, 49 Mo., 298.)

2. The next and only remaining point made by the appellant here is upon the instructions given for the plaintiff. The instructions do not seem to be objectionable; but if they were they are not subject to review here. Although the defendant excepted to the ruling of the court when the instructions were given he did not afterwards raise the same objection in his motion for a new trial. The motion is not based on any error in this court in giving instructions. The object of a motion for a new trial is that the court may have the chance to correct any errors that were made upon the trial; and where instructions were objected to on the trial; this point must again be presented to the court so as to allow the error if any to be corrected without an appeal to this court.

Upon the whole record, I think the judgment was for the right party.

Judgment affirmed. Judge Vories not sitting. The other Judges concur.

JOHN W. STRAWBRIDGE Respondent, *vs.* A. C. CLARK, Appellant.

1. *Execution—Land, repeated sales of, under—Difference in bids—Suit for, etc*—Where land exposed for sale under an execution is bid off, but the money is not paid over, and the land is re-sold under the same execution, to the same bidder, but for a less sum, if the amount finally paid is sufficient to satisfy the judgment and costs, the defendant in execution will be entitled to maintain a suit in equity for the difference in the bids.
2. *Lands, sale of—Successive liens on—Surplus funds—Belong to whom.*—Where there are several liens on a tract of land, and it is sold under one of them, the surplus after paying the lien under which it was sold, belongs in equity to the next subsequent liens, in the order of their priority.

Appeal from the Linn Court of Common Pleas.

A. W. Mullins, Ch. L. Dobson and Geo. W. Easley, for Appellant.

G. D. Burgess, for Respondent.

ADAMS, Judge, delivered the opinion of the court.

Rockwell O. Thompson was the owner of certain real estate in Linn county, on which he had executed a deed of trust, in favor of the defendant, and upon which there also existed mechanic's liens and judgments. On a prior judgment the Sheriff sold the property at execution sale, and the defendant became the purchaser at the sum of fifteen hundred and one dollars, but refused to pay the bid. The Sheriff tendered him a deed and demanded the money, and afterwards during the same term, resold the property under the same execution, and the defendant again bought it for the sum of $625, which was sufficient to pay the judgment and costs under which the sale was made.

Afterwards Thompson, the defendant in the execution, assuming that he was entitled to the difference in the two bids, transferred to the plaintiff's testator, his interest in this fund in the hands of the defendant, and the testator demanded the same of the defendant and brought this suit for the amount, and having died during the progress of the suit, it was revived and continued in the name of the plaintiff, as his executor.

The defendant claimed the surplus after payment of exist-

ing liens on his deed of trust, and set up the foregoing facts by way of answer as a bar to the plaintiff's right of recovery. This answer was stricken out, and the action of the court duly excepted to.

The plaintiff recovered judgment, and the defendant filed a motion for a new trial, based on the action of the court in striking out his answer, and has appealed to this court.

The Sheriff in selling real estate, acts as the agent of both parties, plaintiff and defendant in the execution, and is bound to protect their interests as far as he can. When a bidder refuses to pay his bid, the statute allows the Sheriff, and it is his duty, to re-sell the property, and if it brings less than the first bid, he may recover the amount of the difference in the two bids by a summary proceeding by motion. In my judgment he may recover such amount for whatever party is entitled to it. It seems however, that this court took a different view in Reed vs. Shepperd, (38 Mo., 463,) and would not allow the Sheriff to collect the difference when the amount of the last sale was sufficient to pay off the execution and costs.

But as this question is not now before this court, it is unnecessary to pass on it. Certainly the defendant in the execution ought not to lose the difference in the bids, and notwithstanding it might have been recovered by the Sheriff as trustee, the defendant as beneficiary ought to be entitled to maintain a suit in equity for it. But Thompson, the defendant in the execution under consideration had given a deed of trust on the land in favor of this defendant. Where there are several liens on a tract of land, and it is sold under one of them, the surplus after paying the lien under which it was sold, belongs in equity to the next subsequent liens in their order of priority. (See Foster vs. Potter, 37 Mo., 534; Reid vs. Mullins, 43 Mo., 306; Helweg vs. Heitcamp, 20 Mo., 569.) In this case the amount of the subsequent deed of trust in favor of defendant and the mechanic's liens was sufficient to exhaust the difference in the two bids, and if the facts set up in the answer be true, the plaintiff had no standing in court.

Judgment reversed and the cause remanded. The other judges concur.

A. A. BAKER, Respondent, *vs.* HENRY J. RICE, Appellant.

1. *Jury—Notes of evidence given to, etc.*—It would undoubtedly be improper to permit a jury to take the attorney's notes of evidence without the consent of the parties or their attorneys. But where such consent is given, the circumstance cannot be afterward urged as an objection to the verdict.

Appeal from Livingston Court of Common Pleas.

Dixon & Wait, for Appellant.

Broadus & Pollard, for Respondent.

ADAMS, Judge, delivered the opinion of the court.

This is an action of replevin for one mare, one horse and one colt.

The defendant by his answer admitted that the plaintiff was the owner of the horse and colt and denied that he was the owner of the mare, and set up property in himself in the mare; and as to the horse and colt, the defendant alleged that they were in his possession as a pledge for payment of one hundred and fifty-six dollars, which the plaintiff had agreed to pay him and had never paid. The replication was a general denial of all the allegations of the answer.

On the trial each party gave evidence tending to prove his side of the case. After the close of the evidence the court gave five instructions for the plaintiff, and fourteen out of fifteen instructions for the defendant.

The jury found a verdict for the plaintiff and the defendant has appealed to this court.

It is unnecessary to recite the numerous instructions given in this case. It is sufficient to say that they presented the case to the jury fairly and very favorably for the defendant in all of its bearings. There was but one instruction asked by the defendant that was refused, and the substance of the refused instruction was contained in other instructions given for him.

So there was no error in giving or refusing instructions. Those given for the plaintiff were proper expositions of the law and were supported by the evidence.

There had been a mis-trial of the case and this jury came

into court and announced that they could not agree, and the attorney for the plaintiff, in the presence of the court and jury remarked in substance, that his client was poor and not able to stand much litigation, and he would be willing to take a majority verdict. This remark was improper and ought not to have been made, but it does not appear to have had any influence on the jury. The jury also remarked that they wanted the notes of the evidence taken down by the respective attorneys, which, after some objections, were finally given to them by the consent of the attorneys for both of the parties. It would undoubtedly have been improper to let the jury take the notes of the evidence, without the consent of the parties or their attorneys; but as they gave their consent, it cannot be urged here as an objection to the verdict.

Upon the whole case, verdict and judgment seem to be for the right party.

Judgment affirmed. The other judges concur.

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NATHANIEL M. RIDGEWAY and DANIEL D. RIDGEWAY, Plaintiffs, *vs.* HENRY KENNEDY, JOSEPH M. ROBINSON and JOHN TANNIHILL, Interpleaders and Defendants.

1. *Sale on condition—Does not pass title till when.*—A sale and delivery of goods on condition that the property is not to vest until the purchase money is paid or secured, does not pass the title to the vendee, until the condition is performed; and the vendor in case the condition is not fulfilled has a right to repossess himself of the good, both against the vendee and his creditors; and if guilty of no neglect, may recover the goods so sold even from an innocent purchaser.

Appeal from Grundy Circuit Court.

Daniel Metcalf, for Appellant.

Burkholder, Hall and J. H. Shanklin, for Respondent.

EWING, Judge, delivered the opinion of the court.

This was a suit by attachment before a justice of the peace. The writ was levied on certain goods as the property of

Kennedy, which were claimed by Robinson and Tannihill, and on a trial before the justice judgment was rendered for the interpleaders. Plaintiff appealed to the Circuit Court, where the cause was tried by a jury, and a verdict and judgment again rendered for the interpleaders.

On the trial the interpleaders read in evidence a paper signed by defendant Kennedy, showing a conditional sale and delivery of the property to him by Robinson and Tannihill.

The evidence also tended to prove that after the expiration of the time when Kennedy was to pay for the property the interpleaders demanded possession, but at his request they permitted him to retain it a short time gratuitously for the use of the family, and while in possession of Kennedy under these circumstances, it was levied on. It also appeared in evidence that Kennedy, when possession was claimed by the interpleaders, made no claim to the property but acknowledged that it belonged to them. The instructions given on behalf of the interpleaders were correct. A sale and delivery of goods on condition that the property is not to vest until the purchase money is paid or secured, does not pass the title to the vendee until the condition is performed; and the vendor, in case the condition is not fulfilled, has a right to re-possess himself of the goods, both against the vendee and his creditors; and if guilty of no neglect may recover the goods so sold even from an innocent purchaser. (Sto. on Sales, § 313, n. 2; *Id.*, p. 364, n. 1; Parmlee vs. Catherwood, 36 Mo., 479; Little vs. Page, 44 Mo., 412.)

The instructions asked by the plaintiff were framed upon the theory that the instrument read in evidence created merely a lien in favor of the interpleaders, and were therefore properly refused.

There is obviously no merit in the point made as to the admission of evidence.

The statement of Robinson testified to by the constable, was only what was said by him in asserting his claim to the property which was about being levied on. So, the declaration of Mrs. Kennedy, as testified to by the same witness, to the effect

that the property belonged to the interpleaders, though not strictly admissible, was confirmed by all the testimony in the case, and could not have prejudiced the plaintiff; and its exclusion could have had no tendency to produce a different result.

The judgment is for the right party and will be affirmed. The other judges concur.

T. H. MEYERS, Defendant in Error, *vs.* JOHN RUSSELL, Plaintiff in Error.

1. *Notary Public—certificate—alteration—seal.*—The seal of a Notary Public attesting his certificate, need not be impressed upon wax; it is sufficient if it be impressed upon the paper.
2. *Evidence—Proof of contents of writing.*—The statement by a witness that a letter is lost or mislaid, and that to the best of his belief he has destroyed it, is sufficient foundation for evidence of its contents.

Error to Nodaway Circuit Court.

Johnston & Royal, for Plaintiff in Error.

H. M. Jackson, for Defendant in Error.

WAGNER, Judge, delivered the opinion of the court.

The first objection taken, that the amended statement made in the Circuit Court constituted a different cause of action to the one tried before the Justice of the Peace, is not tenable. They were both identically the same, so far as the cause of action was concerned. They were both predicated upon the same items, and expressed the same amounts, only the statement filed in the Circuit Court was more definite and precise.

The defendant moved to quash a deposition taken in the cause before a Notary Public, because it was not properly attested with the notarial seal, which motion the Court overruled. In this, there was no error. The seal was affixed by an impression on paper, and that was sufficient, it was not necessary that it should be impressed on wax, according to the old common law rule.

It seems that the defendant was indicted in the State of Illinois on two several indictments, and the liability for which he was sued was incurred by reason of another person going his surety on his recognizance and paying his fine. It was objected that the recognizance was not properly admissible in evidence. But it was not offered singly and by itself. The whole record of the proceeding, including the indictment, plea of guilty, recognizance and judgment, were regularly certified by the clerk, and attested by the presiding judge in due form as prescribed by the act of Congress in reference to proving the acts, records and judicial proceedings of the different States. The whole record was therefore clearly admissible.

The only other point is the ruling of the Court in admitting in evidence the contents of a letter without producing the original, but I think a proper foundation was laid for its reception.

The witness stated that the letter was lost or mislaid, and that his belief was that he had destroyed it.

Let the judgment be affirmed. The other judges concur.

THE STATE OF MISSOURI, *ex rel.*, JOHN G. WOODS, Circuit Attorney for the 5th Judicial Circuit, Respondent, *vs.* CALVIN W. NARRAMORE, DANIEL CRAMER, AND WILLIAM MCKISSACK, Justices of the Ray County Court, Appellants.

1. *Criminal law—Cause, dismissal of—Fees—Agreement mandamus.*—In prosecutions for misdemeanors, where the proceedings were dismissed, an agreement by defendant with the Circuit Attorney to pay all costs including that officer's fee, would be contrary to public policy, and in case of the insolvency of defendant *mandamus* will not lie against the county judges to compel the payment of the fee.

Appeal from Ray Circuit Court.

James L. Farris, George W. Green and J. W. & J. E. Black, for Appellants.

John G. Woods, for Respondent.

SHERWOOD, Judge, delivered the opinion of the court.

This is a proceeding for a writ of mandamus, instituted in the Ray Circuit Court in the name of the State, on the relation of John G. Woods, Circuit Attorney of the 5th Judicial Circuit, to compel the Justices of the County Court of Ray County to show cause why they should not draw their warrant upon the treasurer of that county for certain fees, alleged to be due relator as Circuit Attorney. A demurrer was sustained to the alternative writ; leave granted relator to file his amended petition, which was done, and the parties then proceeded to trial upon the amended petition as an alternative writ, and we will so regard it.

This amended petition in substance charges that relator for more than three years last past had been Circuit Attorney for the fifth Judicial Circuit, that during that time a great number of cases of misdemeanor had been disposed of by the Circuit Court of Ray County; that in all of said cases when the defendants plead guilty, or were found guilty, a Circuit Attorney's fee of $5.00 was allowed relator as such Circuit Attorney; that in all cases of misdemeanor, when the defendants agreed to pay the costs, and such cases were dismissed by agreement of the Circuit Attorney and of the defendant and with the consent of the court, a fee of $5.00 was allowed to the relator as Circuit Attorney; that in all such cases, when the defendant was insolvent and unable to pay the costs, bills of costs duly examined and certified by the Judge and Circuit Attorney, were by the Circuit Clerk certified to the County Court of Ray County for payment; that in each and all of said cases a fee of $5.00 was taxed for relator as Circuit Attorney, that such bills of costs were not under the control of the relator, and could not be filed with the petition; and the relator prayed that an order be made upon the County Court of Ray County to bring up the said bills of costs; that the said County Court, had in all those cases, refused to draw their warrant upon the treasurer of Ray County for such fees. An alternative writ of mandamus is then prayed for against the justices of said County Court, commanding them to draw their warrant in due form

upon said treasurer for the fees in said bills of costs, as certified, &c., to be due relator and to deliver said warrants to him or show cause, &c.

A demurrer was filed to the amended petition (treating it as the alternative writ) specifying among some things, "That the averments of said writ, are so general and indefinite, that it is impossible for defendants to ascertain, what cases are referred to, or to answer the same."

This demurrer was overruled, and the respondents made return to the writ:

Stating that the Circuit Attorney was not entitled to have a fee taxed, in case of a dismissal of a cause upon agreement of defendant with Circuit Attorney to pay all costs.

That the demand of the Circuit Attorney in such cases was illegal, and against public policy.

That the only cases where respondents refused to allow the Circuit Attorney a fee or to issue a warrant for the same were cases where witnesses were attached and fined for contempt; and those were the only cases where respondents refused to issue warrants.

This last clause was stricken out on motion of relator and respondent excepted.

The cause was tried without the introduction of any evidence on either side, declarations of law were asked by respondents, covering the grounds specified as above, which were refused, and respondents excepted, and the court awarded a peremptory writ of mandamus:

"Requiring the County Court of Ray County in the State of Missouri, to draw their warrant upon the treasurer of said Ray County for the fees due the relator herein, as asked for in his said petition."

It has never been my lot to witness such a masterly piece of vagueness as this petition is. It gives neither date, amount, cause, term of court, year of allowance, nor any other means, by which the fee bills attempted to be referred to in the petition can be ascertained or identified.

In a word, the petition is so utterly worthless that the court

ex mero motu, should have refused to award even an alternative writ upon such a showing.

And the order granting the peremptory writ is equally as vague and indefinite as the petition. The County Court is to draw its warrant, but for what amount, seems to be quite immaterial; for the so-called petition, certainly affords no means for ascertaining it.

As the judgment in this cause must obviously be reversed, it may not, perhaps, be amiss to refer to some of the matters passed upon by the court below.

That portion of respondents' return mentioned above, as having been stricken out, certainly showed good cause, why the peremptory writ should not go—unless it be true, that a Circuit Attorney is entitled by law to compensation when a witness is attached and fined for contempt; a proposition so ridiculous, that is statement is its refutation.

Under our statute, a party may make return, in any way which shows that the relator, is not entitled to the relief he seeks. He may "reply, take issue or demur."

As against the defendant in criminal cases, costs are only the incident of conviction—resulting either from a confusion of guilt or the verdict of a jury, and the County Justices, were clearly right when they made return that the demand of the relator for fees in cases of dismissal by agreement "was illegal, and against public policy."

The law neither recognizes nor sanctions any such agreement between the Circuit Attorney and the defendant.

And yet by means of nice little arrangements of this character costs have accrued, and a great number of counties been saddled with their payment.

The prosecuting officer, if he be so minded, has so many facilities for making illegal compacts with those who are indicted, that it illy becomes courts to increase those opportunties by giving the stamp of legality to iniquitous agreements, and thus widen by judicial construction the avenues to corruption.

But conceding that a defendant might by such an agreement bind himself, still it would by no means follow that the county would be bound thereby.

So far as the county is concerned the whole transaction would be *res inter alios*; and the "voluntary assumption" of the defendant to pay costs, could have, as to the county, no binding force or obligation, nor prejudice its rights.

The judgment is reversed, and the cause remanded. The other Judges concur.

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STATE OF MISSOURI, Appellant *vs.* W. B. MARTINDALE, Respondent.

1. *Judgment, not final—Appeal dismissed.*—An appeal brought up without final judgment will be dismissed.

Appeal from Linn Circuit Court.

Daniel Metcalf, for Appellant.

Geo. W. Easley, for Respondent.

ADAMS, Judge delivered the opinion of the court.

In this case the indictment was demurred to, and the demurrer was sustained, but no final judgment was rendered on the demurrer in favor of the defendant. Instead of rendering final judgment, the Court ordered the defendant to stand in custody for the further action of the grand jury. There being no final judgment the appeal must be dismissed. (See State of Mo., vs. Gregory, 38 Mo., 501; 2 W. S., 1114, § 14.)

Appeal dismissed, the other judges concur.

STATE OF MISSOURI, Respondent, *vs.* T. M. LIPSCOMB, Appellant.

1. *Practice, criminal—Evidence—Negative averments.*—Where the subject matter of a negative averment lies peculiarly within the knowledge of the other party, it is taken as true, unless disproved by that party.

Appeal from the Weston Court of Common Pleas.

Doniphan and Baldwin, for Appellant.

I. The license being regular on its face, with the seal attached, the failure to give date of execution did not invalidate it. (State vs. Clark, 18 Mo., 432; State vs. Rogers, 37 Mo., 367; State vs. Mertens, 14 Mo., 94.)

II. The Weston Court of Common Pleas had no jurisdiction of the offense by indictment. (State vs. Dougher, 49 Mo., 409; State vs. Huffschmidt, 47 Mo., 73.) The city of Weston had exclusive jurisdiction of the offense as proven. (Sess. Act, 1851, p. 176, §§ 19, 23; Sess. Acts, 1868, p. 253; Baldwin vs. Green, 10 Mo., 410.)

John G. Woods & S. A. Young, for Respondent.

Section 30, p. 516, W. S., was re-enacted Feb. 21st, 1871. Therefore the doctrine of the State vs. Huffschmidt (47 Mo., 73,) does not apply to this case.

EWING, Judge, delivered the opinion of the court.

Lipscomb was indicted at the July term, 1871, of the Weston Court of Common Pleas, for selling liquor without a license.

At the trial, the State having given evidence tending to sustain the charge in the indictment, defendant offered to read in evidence a license or a paper in the usual form of a license, purporting to be under the hand and seal of the clerk of the County Court, authorizing him to keep a dram-shop at his stand in the city of Weston, which was excluded by the court.

The certificates of license are without date and there was no offer by the defendant, to show *when* they were actually issued.

A license must be shown by the party claiming its protection. When the subject matter of the negative averment lies peculiarly within the knowledge of the other party, the aver-

ment is taken as true, unless disproved by that party. Such is the case in civil or criminal prosecution for a penalty for doing an act which the statutes do not permit to be done by any persons except those who are duly licensed therefor; as for selling liquors, exercising a trade or profession and the like.

Hence the party, if licensed, can show it without the least inconvenience. (See 1 Green. Ev., § 79; 10 Mo., 591.) The indictment charges, that a sale was made in June 1871, and the evidence introduced by the State, sustains the allegation. The license offered, covered a period of, commencing March 24, 1871, and ending September 24, 1871, during which the sale is charged and proved to have taken place.

But *when* this license was issued does not appear on the face of the paper, or from the certificate of the clerk. The license could have no effect, nor afford any protection, except as to sales made after its issue. (State vs. Hughes, 24 Mo., 147, 151.) The paper offered was therefore properly excluded.

The instructions given on behalf of the State were in accordance with the foregoing views and were correct. The remaining question relates to the jurisdiction of the Court of Common Pleas in such cases.

The court was asked to instruct the jury that in order to find defendant guilty, they must believe that he sold liquor in Weston and Marshall townships, and outside of the city of Weston, &c.

An act approved March 26th, 1868, amendatory of the act to establish a Court of Common Pleas in the county of Platte, confers on that court exclusive original jurisdiction in all criminal cases and misdemeanors, by information and indictment, within the said townships of Weston and Marshall below the grade of felonies. (Sess. Acts, 1868, p. 260.) The act of March 1868, declared, that thereafter no misdemeanor under the laws of the State, the punishment whereof was by fine or imprisonment in a county jail, or both, should be indictable; but all such offenses, should be presented to the court having jurisdiction, by information. (Sess. Acts, 1868, p. 81.) This act was repealed by that of February 24, 1869, but it did not have the

effect to restore the provision of the general statutes of 1865, which provided for indictment in such cases. By a subsequent act, however, February 21st, 1871, section thirty of the general statutes is re-enacted, under which the offense with which defendant stands charged is indictable. The cases of the State vs. Huffschmidt, 47 Mo., 73, and the State vs. Dougher, 49 Mo., 409, arose and were decided after the act of March 28th, 1868, was passed, and have therefore no application to the case at bar.

Judgment affirmed. The other Judges concur.

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UNION BANK OF MO., Appellant, *vs.* JOHN MCWHARTERS, Respondent.

1. *Deed—Judgment—Variance not fatal, when.*—A Sheriff's deed is not invalid because it recites a judgment against Smith & Haliburton, while the record in the cause shows a judgment against Jacob Smith and Wesley Haliburton.

Appeal from Linn Circuit Court.

G. D. Burgess, for Appellant.

A. W. Mullins & G. W. Easley, for Respondent.

ADAMS, Judge, delivered the opinion of the court.

This was ejectment for a tract of land in Linn County.

The plaintiff showed a perfect chain of title in itself.

The defendant claimed by mesne conveyances under a sheriff's deed made under an execution sale of the land as the property of plaintiff.

The plaintiff objected to the sheriff's deed on the ground of variance from the judgment, and on the ground that the judgment as recited in the execution and deed was void. The court overruled these objections and the plaintiff afterwards raised the same objections by way of instructions which were refused. The plaintiff then took a non-suit and by leave of Court moved to set it aside and this motion was overruled and exceptions duly saved.

The plaintiff's objection to the deed was, that it recited a judgment in the name of Smith and Haliburton against the plaintiff, whereas the record showed a judgment in favor of Jacob Smith and Wesley Haliburton against the plaintiff. The only difference in the record and the deed is the addition of the Christian names.

This in my judgment constitutes no variance at all. It merely shows that the christian names were omitted by the clerk in issuing the execution, and if this omission was material the court would allow it to be supplied at any time by an amendment.

An objection was made to the introduction of the fee book or book in which costs are taxed up. The judgment in that case was in favor of Smith and Haliburton for costs in a suit that had been brought against them by the Bank, and this book was proper evidence to show the amount of the judgment.

The judgment as recited in the execution and Sheriff's deed corresponded precisely with the amount of costs as taxed. I see no valid objection to this evidence.

The remaining objection is that before the judgment for costs was rendered against the Bank, Jacob Smith, one of the parties had died. The execution sale and Sheriff's deed were good, notwithstanding the death of Smith. (See Coleman vs. McAnulty, 16 Mo., 173.)

Let the judgment be affirmed. The other Judges concur.

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A. W. Raysdon, Interpleader, Plaintiff and Respondent, ***vs.*** Jacob A. Trumbo and Michael McGuire, Defendants and Appellants.

1. *Practice, civil—Instructions, scope of.*—Instructions should be given with reference to the whole case, and not with reference only to a few of the facts involved.

Appeal from Livingston Court of Common Pleas.

Broadus, Pollard & Wait, for Appellant.

C. H. Mansur, for Respondent.

Vories, Judge, delivered the opinion of the court.

Trumbo and McGuire sued Moussier and wife before a justice of the peace, to recover the amount of an account contracted by the wife, and, as was charged, upon the faith and credit of her separate property, &c. An attachment was issued in the cause, and levied on two horses and harness as the property of the defendants in the action. Alfred W. Raysdon, the respondent here, appeared in the justice's court, and filed his interplea, in which he states or claims that the said attached property is not the property of Moussier and wife, or either of them, but that said horses and harness were at the time of the levy of the attachment, and still are the property of said Raysdon absolutely, &c. A trial was had before a justice upon this interplea, which resulted in a judgment in favor of the said Alfred W. Raysdon, and against the said Trumbo and McGuire. From this judgment Trumbo and McGuire appealed to the Common Pleas Court in Livingston county. In the Common Pleas Court, the issues on the interplea were again tried, which again resulted in a verdict and judgment in favor of the Respondent; from this last judgment Trumbo and McGuire appealed to this court.

It appears from the bill of exceptions that the evidence on the part of Raysdon the interpleader, tended to prove that the wife of Moussier was his sister, that Moussier was insolvent; that the mother of Raysdon, and Moussier and wife, resided together, and that Raysdon who claims the property in dispute, purchased a farm in Livingston county, and the horses in question, together with household furniture and other property, and placed all of the property, real and personal, in the hands of Moussier and wife and his mother, who all moved upon the farm, and there used the other property, and that Raysdon went to California, giving Moussier and wife no authority to dispose of any of the property without the consent of his mother, whom he had left as his agent to dispose of the property if she deemed it necessary.

The plaintiff after having introduced evidence tending to prove these facts, closed the evidence on his part, but notified the court that he might want to introduce other evidence after the evidence for the defense was closed, and he asked leave of the court, so to do. To this defendants objected, but without the court having made any ruling on the matter, the defendants proceeded to introduce their evidence which tended to show that Mrs. Moussier contracted the debt for which the suit was brought against her and her husband; that the debt was for necessaries for her and family; that at the time the debt was contracted, she represented that the horses and harness were her property, and that the credit was given upon said representation; that she had the horses with her when she purchased the goods, and that she and her husband always drove the horses when they came to town.

The defendant also produced evidence by which it was proved that plaintiff or interpleader had admitted that the horses in question were the property of Mrs. Moussier, and bought with her money, &c. After the defendant closed his case, the plaintiff was permitted to give further evidence in chief, as well as in rebuttal, to which evidence in chief the defendant objected and his objection being overruled, he excepted.

After the evidence was closed, the court at the request of the plaintiff, gave the jury some five instructions, which were objected to by the defendants, and their objection being overruled, they excepted. The second, third and fifth of these instructions were as follows:

."2nd. That although the jury may believe from the evidence that the horses were bought by plaintiff with money inherited by Mrs. Moussier from the estate of a former husband; yet if they shall believe from the evidence that the said horses remained in the possession of plaintiff and were in his possession at the time they were seized by the constable, in this cause, then they must find for plaintiff."

"3rd. That possession need not be personal, and that if the jury believe from the evidence, that the horses were bought and placed by plaintiff in the possession and under the con-

trol of his mother, and that they so remained up to the time of the levy by the constable in this cause; then such possession of his mother was the possession in law of plaintiff and they will find for plaintiff."

"5th. That although the jury may believe that plaintiff held said horses for the use of Mrs. Moussier, and that they were bought with her money; yet they must find for the plaintiff, unless they shall believe that he by himself or his agent had given the entire possession and exclusive control of said horses to Moussier and wife."

With the view which I have of this case, it will not be necessary to notice any further exceptions taken in the case than the exception taken by the defendant to these instructions. It should be borne in mind that instructions should always be given in reference to the issues to be tried by the jury and not be restricted to only one fact, or one set of facts, which only make out part of the case being tried, and tell the jury that if those facts are found, they will find the whole case for either the one party or the other; and then they should also be predicated upon the evidence in the case. (Chappell vs. Allen, *et al.*, 38 Mo., 213.)

In this case the plaintiff claims in and by his interplea, that he was the absolute owner of the horses, and issue is taken upon this claim of absolute ownership on his part. The first instruction above set forth, assumes that notwithstanding the horses were purchased with the money of Mrs. Moussier, and that plaintiff had in fact no title to them, yet if they were in his possession, he had a right to recover them in this action. This was certainly wrong. There is also another objection to this instruction, which is, that there is not a particle of evidence in the case to show that plaintiff was in possession of the horses when the levy was made; but on the contrary, the evidence shows that he had left the State, and had been for over a year in California, leaving the horses with Moussier and wife, and his mother for their use and benefit, and there is no pretense that they were his mere servants, so as to make their possession, his possession

The instruction numbered three above set forth, tells the jury that if the horses had been placed in the hands of plaintiff's mother by plaintiff, where they had remained at the time they were taken by the constable, that this fact alone would authorize them to find for the plaintiff. This restricts the jury to the finding of but one fact, that is the possession of the plaintiff's mother of the horses. All other facts in the case being ignored, and the main fact, which is the plaintiff's title is wholly lost sight of. The other instruction is subject to the same objection, and was also improperly given, and must have misled the jury in reference to the main issues in the case.

The instructions asked by defendants, and refused by the court, I think were properly refused, and that those numbered two and five, if they had been objected to, ought to have been refused. The statements of Moussier and wife in plaintiff's absence, were not evidence against him, unless he knowingly permitted them to hold themselves out as the owners of the horses. No opinion is expressed as to the sufficiency of the affidavits filed with the motion for a new trial to entitle defendants to a new trial.

As it is not necessary in this case, I have not examined it, but suppose that the court who try causes in the first instance and see the conduct of the parties in such cases, would be more competent to correct the abuses complained of. Some of the instructions asked by the appellants, seem to have been founded upon the facts in the original case, and not upon the facts proved on the trial of the interplea. With this part of the case we have nothing to do here upon the hearing of the case before us, but we would suggest to the parties that there may be some difficulty in maintaining a mere action at law against a married woman. (See Schafroth Admr., &c., vs. Peter Ambs and wife, 46 Mo., 114.)

For the reason that the court below improperly directed the the jury upon the trial of the cause, I think the judgment should be reversed. The other judges concurring, the judgment is reversed, and the cause remanded.

STATE OF MISSOURI, Respondent, *vs.* THOMAS LINNEY, Appellant.

1. *Practice, civil—Trials—Evidence—Order of, discretionary with court.*—The order and manner of introducing testimony is always a matter resting largely in the discretion of the Court.
2. *Criminal law—Homicide—Self defense no justification, when.*—A party who seeks and brings on a difficulty, cannot avail himself of the doctrine of self-defense, in order to shield himself from the consequences of killing his adversary, however imminent the danger in which he may have found himself in the progress of the affray.
3. *Criminal law—Homicide, cruel and unusual—Jury.*—What constitutes a cruel and unusual manner of killing, is properly left to the jury to determine.
4. *Verdict, modification of by the Court.*—When the jury assess an imprisonment for less term than the law allows, they may modify their verdict under the direction of the Court.
5. *Criminal law—Homicide—Time of counsel in addressing jury.*—The Court may limit the time of counsel in addressing a jury in a murder case.

Appeal from Livingston Circuit Court.

J. E. Wait, for Appellant.

I. The Law of Self Defense necessarily includes the right of attack, and the 5th instruction given for the State is erroneous. (State of Mo. vs. Sloan, 47 Mo., 604; see page 613; Rose. Crim. Ev., cited and approved; Wharton's Crim., Law, 5th Rev. Ed., §§ 1026, 1027; State vs. Scott, 17 Mo. 521.)

II. The sixth instruction given for the State is erroneous. It is founded upon § 11, page 447, 1st Wagner Statutes, and fails to assign what would constitute a cruel and unusual manner, or to set forth any hypothesis of facts proven, which would guide the jury in determining what would be killing in a cruel and unusual manner. (See State vs. Pugh, 15 Mo., 509.) It is also misleading.

III. The Court erred in limiting the time of Counsel. This, in a Criminal Case, is in conflict with our Bill of Rights. (§ 18, Art., 1, Const. of Mo., Commonwealth vs. Word, 3 Leigh, 758.)

James Shields, for Respondent.

WAGNER, Judge, delivered the opinion of the court.

We have scarcely ever examined a record of this length where the appellant had so little ground for reasonable complaint. The first objection relied on, that the court erred in

excluding a part of the conversation of a witness when it had admitted the balance, is not good. The question propounded to the witness in his cross-examination, and the testimony sought to be elicited, related to an entirely different transaction from what he had been previously testifying to, had no necessary connection or congruity with it, and was not a part of the same conversation.

There is nothing in the point that the Court permitted the State to introduce additional evidence after the defendant had closed his case. The defendant was again allowed to introduce evidence in rebuttal, and the order and manner of introducing testimony is always a matter largely resting in the discretion of the Court.

The instructions, which are numerous, taken as a whole, constitute a fair presentation of the law. The fifth given for the prosecution is the most strenuously opposed in this court, and that told the jury that the right of self defense does not include the right of attack, and that a party who seeks and brings on a difficulty cannot avail himself of the doctrine of self defense in order to shield himself from the consequences of killing his adversary, however imminent the danger in which he may have found himself in the progress of the affray. Nor in such case would the father be justified in killing the adversary of the son, provided the son had provoked and brought on the conflict in which the son was so placed in imminent danger during the progress thereof; provided always that the father knew that his son had sought or brought on the difficulty.

There is certainly no law to justify the proposition that a man may be the assailant and bring on an attack, and then claim exemption from the consequences of killing his adversary on the ground of self defense. While a man may act safely on appearances, and is not bound to wait till a blow is received, yet he cannot be the aggressor and then shield himself on the assumption that he was defending himself.

So in defending his family he may not do for them what he would not be warranted in doing for himself.

Exception is also taken to the sixth instruction, which declared that if the jury believed from the evidence, that the defendant, without a design to effect death, in the heat of passion, but in a cruel or unusual manner, shot and killed the deceased, but not under such circumstances as to constitute excusable or justifiable homicide, then he was guilty, etc. This instruction is drawn in the language of the statute, but it is contended that it was erroneous, because the court did not define what was a killing in a cruel or unusual manner. That, however, was a matter to be determined by the jury on the evidence before them. The question does not arise upon any allegation in the indictment, but springs wholly from the evidence. We know no standard by which the court could define what constitutes cruel or unusual killing. Every killing is generally cruel, and there is no definite or usual manner of performing the act that I am aware of. Therefore, it is a subject that must be left to the jury to be determined by the testimony in the case.

The action of the Court in reference to the verdict will not justify a reversal. The jury assessed the punishment at imprisonment for a less term than the law allows, and the court modified the verdict so as to make it legal, and the jury then presented the same as their verdict.

The court limited the time of counsel in addressing the jury, and it is argued that there was no right to place any restriction upon them. This question was formerly raised and decided by this court in favor of the ruling complained of, and we are not disposed to review the subject. Moreover, it does not appear that the counsel in this case did not have sufficient time. The power to limit and restrict the time might be abused, and a case might be presented in which this court would feel itself called upon to interfere.

Upon an inspection of the whole record, we think the defendant had a fair trial, and the judgment must therefore be affirmed.

The other judges concurring.

G. D. BURGESS, Respondent, *vs.* MARION CAVE, Appellant.

1. *Judgments, assignment of—Statute—Equitable title.*—The statutory mode of assigning judgments is cumulative, and does not prevent a party from making an equitable assignment in any other lawful way.
2. *Judgments, assignment of—Execution—Sheriff, notice of assignment.*—If a sheriff with an execution in his hands, receives notice of the assignment of the judgment, he must hold the money when collected, for the use of the assignee.
3. *Judgments, assignment of—Husband and Wife—Power of disposition.*—The husband is the proper party to receive payment of a judgment in favor of himself and wife, or the money may be paid to the sheriff to be applied by him in favor of the husband's execution-creditor.
4. *Sheriff—Execution, return of—Liability for interest—Demand*—A sheriff is not liable for interest upon the return of an execution, until a demand is made on him.

Appeal from Linn County Court of Common Pleas.

A. W. Mullins, for Appellant.

G. D. Burgess, for Respondent.

I. The assignment passed no title to, the Respondent. It was not made on, nor was it attached to the record of the judgment., (1 W. S., p. 794, § 34; Baker vs. Stonebreaker, 34 Mo., 176.) nor was it attested by the clerk.

ADAMS, Judge, delivered the opinion of the court.

The defendant as sheriff of Linn County had in his hands and directed to him, an execution in favor of James M. Pendleton and Susan Pendleton, his wife, vs. George W. Easley, and at the same time, an execution in favor of Hayden and Wilson vs. James M. Pendleton. Easley, the defendant in one of the executions, paid the amount due from him, to the sheriff on the execution of James M. Pendleton and Susan Pendleton, his wife, vs. George W. Easley.

The execution against Easley was dated the 7th day of November, 1869, and on the 12th day of November, 1869, the said Pendleton and wife, for value received and in good faith, assigned to the plaintiff their judgment against Easley, which assignment was in writing on a separate paper, but attached to the record of the judgment and attested by the clerk of the court.

The evidence showed that the note on which the judgment against Easley was rendered was given to Pendleton's wife at the request of Pendleton, and that the wife had no connection with the transaction in which the note was given. The evidence strongly tended to show that the plaintiff notified the defendant (sheriff) before the payment by Easley, that he was the owner of the judgment of Pendleton and wife vs. Easley, and that the judgment had been assigned to him.

The defendant (sheriff) instead of holding the money that was paid by Easley for the plaintiff, who was assignee of the judgment against Easley, applied it to the payment of Hayden and Wilson's judgment against Pendleton.

The statutory mode of assigning judgments (1 W. S., 794, § 34.) is cumulative and does not prevent a party from making an equitable assignment in any other lawful way. When it is made under the statute before the execution is issued, it becomes the duty of the clerk when he issues an execution to indorse it for the use of the assignee. The execution in this case was already in the hands of the sheriff when the assignment was made, and could not be so indorsed. But the notice by the assignee of his ownership of the judgment was sufficient to require the sheriff to hold the money for his use; after such notice he had no authority to apply it to the execution of Hayden and Wilson vs. Pendleton.

It may be conceded that the transfer was not complete as to the debtor, without notice to him, and that before notice he would have the right to pay the debt to his creditor or to the sheriff under the statute, on the other execution.

But as the sheriff himself was notified of the assignment when the money was tendered and paid by Easley to him, he could only receive and hold it for the benefit of the assignee. The money became a trust fund in the hands of the sheriff, and it was his plain duty to pay it to the assignee. The only material question was one of notice by the assignee to the sheriff of his ownership of the judgment. Whether the sheriff was so notified, was a question of fact to be found by the jury or the court sitting as a jury. The finding and judg-

ment was for plaintiff, but the case was not properly presented by the instructions, and must be sent back to be tried again.

The instruction numbered two, given for plaintiff, ignored the question of notice entirely, and also required that interest should be allowed from the return of the execution. This instruction seems to be predicated upon the erroneous idea, that because the judgment was in favor of both husband and wife, the debtor could not pay it on an execution against the husband alone, and that such payment would be illegal whether there was notice of the assignment or not. There is no pretense that the debt belonged to the wife for her separate use. As the judgment was in the name of both, as long as the husband lived he was the proper party to receive payment, and it might therefore be paid by paying it to his execution creditor, or rather to the sheriff for that purpose.

This instruction therefore was erroneous in not presenting the main issue, the question of notice of the assignment.

It was also erroneous in demanding interest from the return of the execution. A sheriff is not liable for interest in such case till a demand is made for the money.

I see no objection to the third instruction which was given. It properly declared the law to be that the assignment by Pendleton and wife transferred their interest in the judgment to the plaintiff.

Instruction number six, given for plaintiff, is manifestly erroneous. It emphatically presents in substance the same proposition declared by instruction two.

Instruction number seven given for plaintiff, presents a question entirely outside of the issues; and bases the plaintiff's right of recovery upon the ground that this debt was exempt from execution, because Pendleton was the head of a family, and had a right to elect debts in lieu of other property to the amount of three hundred dollars as exempt from execution. It is unnecessary to pass upon the point whether this right of exemption could be transferred or not. Conceding that it could, the plaintiff does not claim by virtue of such transfer, and is not entitled to recover on any such ground.

Instruction number three, given for defendant, is also erroneous because it assumes that the judgment could not be assigned so as to pass the title and render the defendant liable, although he received the money with full notice, unless such assignment was made in accordance with the directions of the statute. This error however is no ground for reversal, because the judgment is not complained of by the plaintiff against whom the error was committed, and is only noticed now that the same error cannot be committed on a re-trial of the case.

I see no objection to instruction number one asked by the defendant and refused by the court. That instruction in substance declared the law to be that if the sheriff, without any notice of the assignment to the plaintiff, received the money from Easley in payment of Hayden and Wilson's judgment against Pendleton, then he is not liable to the plaintiff.

For the errors here noticed, the judgment will be reversed and the cause remanded. The other judges concur.

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JOSHUA BROWN, Respondent, *vs.* THOMAS CARTER, Appellant.

1. *Trespass—Fencing, Removal of—Possession, etc.*—An action of trespass under the statute for removing certain fencing will not lie against a defendant who is in actual possession of the premises on which the fence was built. In such case the remedy is by ejectment.

Appeal from Daviess Common Pleas.

James McFerran, for Appellant, cited: Cochran vs. Whitesides, 34 Mo., 417.

Allen H. Vories, for Respondent.

EWING, Judge, delivered the opinion of the court.

This was an action of trespass under the statute to recover treble damages for removing from the land described in the petition certain fencing.

The answer denied the allegations of the petition, and for

further defense to the action alleged that defendant being the owner of a larger tract, including the parcel of land on which the trespass is claimed to have been committed, conveyed the said last mentioned tract by deed of gift to his son John Carter, and being in doubt as to the true boundary between them, in reference to the fence, reserved said fence, and that in the sale of the same subsequently by his said son, to the plaintiff's intestate, a similar reservation was made of said fencing for his, defendant's benefit, and as his property. The answer also alleges possession by the defendant of said fence continuously both before and after the purchase of the land on which it stands by the defendant, and that it formed part of the enclosure of his farm, which farm was in his possession at and before the commencement of the suit.

The Court sustained a motion of plaintiff to make the answer more definite and certain, to which defendant excepted; and failing to file an amended answer, there was an inquiry of damages by a Jury, and a verdict for plaintiff for $87.75, and a judgment for treble that sum rendered by the court.

A motion for a new trial being overruled, defendant excepted, and brings the cause to this Court by Appeal.

The record presents but a single point for our consideration, namely, the ruling of the court, in sustaining the motion, to make more definite and certain, defendant's answer. The motion applied to the whole answer, as well as to that part which traversed the allegations of the petition, as to the new or affirmative matter which, it is claimed, constituted a defense to the action.

This new matter, as already stated, consisted of an alleged reservation of the fencing, both at the time of the conveyance to a son of defendant, and to the plaintiff's intestate. How this reservation was made, what the conditions, if any, does not appear. But so far as it may involve the Statute of Frauds, the presumption is in favor of its validity. (Gist vs. Eubank, 29 Mo., 248.)

Although it may have turned out on the trial that such reservation was no bar to the action, it may have been admis-

sible in mitigation of damages, or rather for the purpose of showing a liability for single damages only. The act concerning trespasses contemplates voluntary or willful trespasses only, which are done without lawful right, and it inflicts penalties upon the defendant as a wrong doer. (Baker vs. Hannibal & St. Joseph Rail Road Co., 36 Mo., 543; Schmitt vs. Densmore, 42 Mo., 225.)

The statute provides that if it shall appear on the trial, that the defendant had probable cause to believe that the land on which the trespass is alleged to have been committed, or that the thing so taken, carried away, injured or destroyed, was his own, the plaintiff in the action or prosecution, shall receive single damages only; (2 W. S., § 4, 1346,) and while the burden of showing probable cause for the trespass is on the defendant, it has been held that it is not necessary that he should set it up in his plea or answer. (Walther vs. Warner, 26 Mo., 143, 149.)

But is expressly averred that the defendant was in the possession of the fencing, and the farm which it in part enclosed, at and long before the commencement of the suit. This action can be maintained only where the plaintiff is in the possession of the close at the time of the commission of the trespass. It is an action for injury to the possession, which may be actual or constructive. But if the defendant be in the actual possession the action cannot be maintained, and plaintiff's remedy is by ejectment. (Cochran vs. Whitesides, 34 Mo., 417.) This issue was made by the answer, and it was a question of fact, which if found as alleged in the answer, would have been decisive of the case in defendant's favor, independently of any other issue made by the pleadings.

The Court erred in sustaining the motion to make the answer more definite and certain.

The judgment is reversed and the cause remanded. The other Judges concur, except Judge Vories, who having been of counsel did not sit.

J. C. TIFFIN, Respondent, *vs.* DANIEL LEABO, Appellant.

1. *Statute of Limitations—Bills and notes—Suits thereon by a stranger.*—When the statute of limitations is appealed to as a defense against a note, evidence that a suit was instituted thereon within the ten years by a stranger to the note is admissible.

Appeal from the Common Pleas Court of Daviess County.

McFerran, Kost and Gillihan, for Appellant.

The suit of Tiffin v. Leabo is not a continuation of the suit of Place v. Leabo, and can have no connection with said suit because the plaintiffs are not the same. See Williams v. Council, 4th Jones Law, (N. C.) 206.

EWING, Judge, delivered the opinion of the court.

This suit originated in a Justice's Court and is founded on a note of the defendant to Tiffin the plaintiff, dated January 2, 1860, due one day after date. The summons issued by the Justice bears date January 31, 1870, and was served on the same day.

There was a judgment for the plaintiff from which defendant took an appeal to the Common Pleas Court. On the trial in the Common Pleas Court, defendant having read the note in evidence to show that the action was barred, plaintiff introduced evidence tending to prove that a previous suit had been brought on the note, within ten years after the cause of action had accrued, before a Justice of the Peace in the name of one Charles Place, against the defendant. This evidence was objected to by the defendant, but the objection was overruled and the evidence admitted. This is the only question the record presents for our consideration. The justice who tried the cause testified that a previous suit had been brought in the name of Place on the note before the expiration of the ten years from the time of its maturity, and that a motion to dismiss it was filed, alleging that Place had no interest in the subject matter of the suit—he having no title to, or interest in the note; that plaintiff, after the motion had been taken up by the justice, either took a non-suit or the cause was dismissed, he did not remember which; that he made no entry or

memorandum of same on his docket; and that the note remained in his office and a new summons issued the same day in favor of plaintiff Tiffin. The theory upon which this evidence was admitted is not very apparent. The defense to the action being, that it was barred by the statute of limitations, it is not perceived how this evidence tended to disprove such a defense or to rebut the evidence introduced by defendant. The original suit was brought by a stranger to the note, who had acquired no title to or interest in it himself, and who stood in no such relation to the payee, Tiffin, as trustee or otherwise, as would give him any right of action in his own name to the use of Tiffin. The second suit being brought in the name of the payee, Tiffin, is an admission by him that the first action before the justice was improperly instituted in the name of Place.

The judgment is reversed and the cause remanded. The other judges concur.

—o—

JOSHUA R. SAUNDERS, Respondent, *vs.* JACOB BROSIUS, Appellant.

1. *Practice Civil, pleadings—Allegations—Damages—Remoteness.*—Where in a petition for conversion of a carpet bag containing plaintiff's clothes, plaintiff as one cause of action, alleged that in consequence of such conversion, he, a laboring man, was compelled to work in unsuitable clothes, which were damaged thereby. *Held*, that such an allegation could only be made and proved as special damages under the count for conversion, and such damages were too remote.

Appeal from Common Pleas Court of Daviess County.

James McFerran, for Appellant.

The facts stated in the second count of the petition do not constitute a substantive cause of action, they could only be considered as to the measure of damages, but such damages were too remote. (Douglas vs. Stephens, 18 Mo., 366.)

Joshua F. Hicklin, for Respondent.

VORIES, Judge, delivered the opinion of the court.

The respondent in this action brought his suit against the appellant, in the Daviess Court of Common Pleas, to recover for the conversion of certain goods in the petition named.

The petition had two separate counts, by the first of which it is stated that the defendant was the proprietor and keeper of a tavern or hotel and house of public entertainment in the town of Hamilton, in Caldwell County. That on the 11th of April, 1868, the plaintiff, who was then a traveler passing through said town, put up and stayed all night at said Hotel. That at the time he stopped at said Hotel, he left and placed in the care of defendant, a valise or carpet bag containing articles of clothing which are set forth; that after plaintiff had stayed all night at said house, he in the morning paid all charges against him, and demanded of defendant his said carpet bag, but that said defendant wholly failed and refused to deliver the same to plaintiff, and that he has ever since failed and still fails to deliver the same to plaintiff, or any of the contents thereof. The petition then states the value of the said carpet bag and articles of clothing to be $71 dollars, and asks judgment for said sum.

In a second count in said petition it is stated for a further cause of action, that at the time aforesaid in the year 1868, plaintiff was a poor man, and was compelled to do manual labor for a livelihood; that all of the wearing apparel suitable for labor, belonging to plaintiff, was among the articles contained in the carpet bag aforesaid, which was and is wrongfully held and detained by defendant. That because of said want of clothing, he was compelled to labor in clothing that was unsuitable, and intended for a different purpose, which defendant well knew; that plaintiff had been at great trouble and expense in going a long distance, to and from said hotel, for the purpose of obtaining the carpet bag aforesaid, and for the reasons herein as stated, he claims damages in the sum of forty-five dollars.

To this petition, defendant filed an answer by which he denies all of the material allegations of the petition.

The defendant then, by way of a special defense to the peti-

tion, admits that plaintiff was his guest as charged in the petition, but charges that on the morning when plaintiff left his house, he without leave of defendant, and wrongfully, went into the baggage room of defendant's hotel, and took and carried away therefrom a carpet bag of the value of twenty-five dollars, which was the property of Oliver Bucan, who was then a guest of defendant, and left the carpet bag sued for in the baggage room of defendant's hotel; in consequence of which negligence, and wrongful act of plaintiff, defendant was compelled to pay said Bucan twenty-five dollars for the carpet bag so wrongfully taken by plaintiff; shortly after this plaintiff informed defendant that the said carpet bag, so belonging to said Bucan had been lost or destroyed. That it was then agreed by and between plaintiff and defendant, that defendant should hold and retain the carpet bag sued for, until plaintiff paid the defendant the sum of twenty-five dollars which had been advanced and paid by defendant to said Bucan, which plaintiff then agreed to pay within ten days. That plaintiff failed to pay said sum or any part thereof; that defendant was ready and willing to deliver plaintiff his said carpet bag as soon as said sum should be paid. That in consequence of the failure of plaintiff to so pay said sum, and receive his property, the said carpet bag and its contents became mouldy and worthless, by all of which defendant says he has been damaged in the sum of twenty-five dollars, which he prays may be recouped against any demand that plaintiff may have against him, and that he may have judgment, &c.

A replication was filed by plaintiff denying the allegations set forth in this last defense.

A trial was had on the issues thus made by a jury, each party introduced evidence tending to prove his part of the case, and during the introduction of the evidence, the plaintiff offered under the second count in his petition, to prove that plaintiff was a poor man, and that in consequence of defendant's refusal to deliver him his carpet bag and clothes, he was compelled to wear and spoil a fine suit of clothes, while at work, to which said clothes were unsuited, and that the said

costly clothes were thereby spoiled, &c. To this evidence the defendant objected, because said second count set up no cause of action against defendant, and because the damages attempted to be proved, were too remote and not recoverable in the action. The court overruled the objection and admitted the evidence, to which ruling the defendant excepted.

After the evidence was closed the court, at the request of the plaintiff, gave the jury some eight or nine instructions, to which defendant objected and excepted. The defendant then moved the court to give the jury eleven instructions, all of which were refused but one, to which defendant again excepted.

The jury returned a verdict against the defendant, on each count of the petition. The verdict on the first count, being for the alleged value of the carpet-bag and clothes as charged in the petition, $71.00 and upon the second count $20.

The defendant then filed his several motions for a new trial and in arrest of the judgment; the said motions each being overruled, the defendant excepted and appealed to this court.

It is not necessary for the purposes of this case, that I should notice the various instructions given on the part of the plaintiff and refused on the part of the defendants.

The only questions necessary to notice grow out of the evidence offered to prove the allegations set up in the second count of the petition, that is, that plaintiff was poor and unable to buy clothing, and that by the defendants having detained his carpet-sack and clothing, he was compelled to perform work in a fine cloth suit of clothes, when cheaper ones would have been better suited for the purpose, and that he was thereby damaged, &c.

I think the damages sought to be proved by said evidence were too remote and not recoverable in this action, and that the evidence was therefore improperly admitted.

The court also gave the jury the following instruction, predicated upon this evidence. "If the jury believe from the evidence that on and after the time the carpet bag was detained

by the defendant, the plaintiff was a poor man and did manual labor for a livelihood, and that he was wholly unable to supply himself with suitable clothes to so work, and for want of such clothing, he was compelled to wear out costly clothing, they may allow him such damages, as they believe from the evidence he has sustained, provided they further believe that said carpet bag was deposited with defendant and wrongfully detained by him, and provided further they believe the circumstances and condition of plaintiff were known to defendant."

I think this instruction was clearly wrong—the damages contemplated in said instruction were too remote, and not the direct or natural result of the wrongful act of defendant, (Crain vs. Petrie, 6 Hill, 522; Hurd vs. Hubble, 26 Conn., 389.)

The damages claimed in the second count of the petition, if they could be recovered at all, could only be recovered on the ground that they were the natural and proximate result of the act of detaining and converting plaintiff's goods, and could only be alleged and proved by way of special damages and recovered upon the first count of the petition.

These damages, if they could be called damages, did not form a substantial cause of action upon which a separate action could be brought; they were only incidental to the cause of action stated in the first count. It is not necessary to examine the instructions refused by the court, which were asked by the defendant, but it may be added, that there was some evidence tending to prove that plaintiff wrongfully took the carpet bag of Bucan, which was lost, and that he had agreed to pay for it and pledged the carpet bag sued for as security for the payment of the amount. This view of the case should have been submitted to the jury; some of the instructions refused did present this view and ought to have been given, so that the jury could have passed upon these facts. I therefore think the judgment in this case for the reasons aforesaid ought to be reversed.

The other judges concurring, the judgment of the said court of Common Pleas is reversed, and the cause remanded.

JEREMIAH OREAR, Appellant, *vs.* E. N. O. CLOUGH, Respondent.

1. *Practice, civil—Defendant, appearance of, to have case put at foot of docket, etc.*—The appearance of a party for the purpose of having his case put at the foot of the docket gives the court such jurisdiction as to authorize the rendition of a personal judgment against him.
2. *Attachment—Garnishment—Non-Resident defendant—Jurisdiction, etc.*—Delivery of a copy of the writ to a defendant residing in another state (W. S., 1009. § 181,) and garnishment of a judgment debtor of defendant upon an attachment issued against defendant, is sufficient to give the court trying the cause jurisdiction till the attachment proceedings are determined.

Appeal from Platte Circuit Court.

Hill & Doniphan, for Appellant.

I. The only question properly here is that of jurisdiction in the inferior court. The appearance of the defendant at the April term, A. D. 1870, and placing the cause at the foot of the docket was an appearance which gives jurisdiction. (Rector vs. St. Louis Circuit Court, 1 Mo., 607; 3 Mo., 40; *Id.*, 369 5 Mo., 443; 6 Mo., 50; 7 Mo., 411; 8 Mo., 257; 13 Mo., 154; 26 Mo., 180; 1 Comst., 227.)

II. The service by copy in Kansas, proved by affidavit, was sufficient and complied with the law and gave the court jurisdiction and entitled plaintiff to a judgment on his note. (Gen. Stat., 1865, ch. 164, p. 655, § 18.)

Clough & Wheat, for Respondent.

I. The suit was properly dismissed by the Circuit Court. The defendant was a non-resident, and no jurisdiction was acquired by service of a summons, or by the attachment of any property.

Clough and Belt were garnisheed, but answered and were finally discharged with judgment in their favor against plaintiff for costs, and without exception by plaintiff.

A certain judgment in favor of E. N. O. Clough was attempted to be attached, but a judgment is not the subject of garnishment or attachment. (Hodson vs. McConnell, 12 Ills., 170; May vs. Baker, 15 Ill., 89; Dawson vs. Holcomb, 1 Ohio, 135; Zurcher vs. Mager, 3 Ala., 253; Turner vs. Fendall, 1

Cranch, 117; Kergin vs. Dawson, 1 Gilm., 89–90; Ross vs. Clarke, 1 Dall., 354; Wilder vs. Bailey *et al.*, 3 Mass., 289; Reddick vs. Smith, 3 Scam., 451–2; Williams vs. Rogers, 5 Johns., 167.)

II. Even if defendant, E. N. O. Clough, actually asked that the case be put at the foot of the docket, that was not such an appearance as would waive the service of a summons. It is no *pleading*. (Fithian vs. Monks, *et al.*, 43 Mo., 515.)

III. The personal service of the petition and writ on defendant in Kansas had the same effect as service by publication, and no more; and unless the property was attached within the jurisdiction of the court, the court did not thereby obtain jurisdiction. (W. S., 1009, § 18; Latimer vs. The Union Pacific Railway, E. D.; 43 Mo., 105; Fithian vs. Monks, *et al.*, 43 Mo., 515.)

Adams, Judge, delivered the opinion of the court.

This was a suit by attachment against the defendant as a non-resident of this State. The writ was served on the defendant in the State of Kansas under the 18th section of the 4th article of the Practice Act (2 W. S., 1009,) by delivering to the defendant in the State of Kansas a copy of the petition and writ. Several garnishees were summoned and answered denying indebtedness, and a judgment in favor of the defendant against James S. Bryant rendered in the Platte Circuit Court had been attached, and the sheriff who sold lands under this judgment was garnished.

It also appears from the record that the defendant appeared in the cause and had the case put at the foot of the docket.

When the case was thus standing before the court an entry was made dismissing the cause for want of jurisdiction and rendering final judgment against the plaintiff for costs.

The plaintiff moved the court to set aside the dismissal and judgment and to reinstate the case, and the court overruled this motion and the plaintiff duly excepted and has brought the case here by appeal.

The assumption that the court had no jurisdiction over the defendant, as the record stands before us, is without founda-

tion. His appearance to have the case put at the foot of the docket gave the court such jurisdiction as to render a personal judgment against him. Besides, the service of the writ and petition in Kansas was equivalent to an order of publication. His property was also attached, that is, garnishees had been summoned and a judgment in his favor attached, and the proceedings against the garnishees were still pending and undetermined.

Whether they owned anything, or not, or whether the judgment that had been attached was his property, or had been transferred to an innocent purchaser, were matters still to be tried. There was sufficient jurisdiction over the defendant to hold him till a final trial of the matters in litigation could be had.

In my opinion the court erred in dismissing the case, and for this reason the judgment will be reversed and the cause remanded.

The other Judges concur.

—o—

FOUNTAIN WALLER, Plaintiff in Error, *vs.* A. B. EVERETT, *et al.*, Defendants in Error.

1. *Statutes—Constitution—Public instruction—Sugar Tree Grove Academy, act of incorporation of—Repeal by implication.*—Sections 5 and 6 of the charter of the Sugar Tree Grove Academy, being inconsistent with the present constitution of the State and the acts passed pursuant thereto, is repealed by implication.

Error to Clay County Circuit Court.

Samuel Hardwick, for Plaintiff in Error.

While repugnant statutes necessarily supplant previous ones, they must be clearly repugnant; for unless the legislative intent is expressed in terms, it will not be assumed if any other construction can be given to the subsequent act. (State *ex rel.*, Maguire vs. Draper, 47 Mo., 29, 33; State, *ex rel.* Vastine vs. McDonald, 38 Mo., 529.)

Repeals by implication are not favored by the law and are not operative, unless "plainly repugnant," so that "the two cannot stand together." (Bowen vs. Lease, 5 Hill, 221; McCartee vs. The Orphan Asylum Society, 9 Cowen, 437; 2 Pick., 176; 13 Pick., 348; 20 Pick., 410; 24 Pick., 497; Snell vs. The Bridgewater Cotton Gin Manufacturing Co., 24 Pick., 296; Brown vs. City of Lowell, 8 Met., 172; Tracy vs. Goodwin, *et al.*, 5 Allen, 409.)

D. C. Allen, for Defendants in Error.

In the absence of any constitutional prohibition, the power to pass laws repealing by implication is undoubted, and statutes clearly repugnant to previous ones necessarily supplant them. (Potter's Dw., p. 113, n. 9; *Id.*, p. 154 and n. 4; State, *ex rel.*, Maguire vs. Draper, 47 Mo., 29.)

The constitution expressly repeals all laws which were inconsistent with it. (Constitution, Art. 2, Sec. 3, 1 W. S., 61.)

Sections 5 and 6 of the Charter of Sugar Tree Grove Academy are clearly repugnant to the constitution of 1865, and legislation enacted since then.

EWING, Judge, delivered the opinion of the court.

A writ of certiorari was issued to the defendants, Justices of the County Court of Clay County, upon the petition of plaintiff alleging that he had been erroneously assessed for School purposes. Upon the return being made to the writ, a motion to quash it was sustained by the Circuit Court, and plaintiff excepted and brings the cause to this court by writ of error.

Plaintiff is a stockholder in an Academy known as the Sugar Tree Grove Academy, incorporated by an Act of the General Assembly, approved January 15, 1855. This act constituted the stockholders in said Academy an organized school district, with the same rights, privileges and immunities, and subject to the same liabilities as to accounting for funds drawn from the County Treasury, as other trustees of school districts. It was therein further provided that upon the application of any stockholder of said Academy to the trustees of his original district, they should pay him his due proportion of all school

funds according to the number of scholars listed to said applicant in the reports made to the County School Commissioner for the year 1854; and that each stockholder should be free and exempt from tax for school purposes in his original district from and after the passage of the act.

For the defendants it is maintained that sections 5 and 6 of the charter, the substance of which is given above, are repealed by the act of 1868, and this is the only question for determination. The plaintiff claims that no part of the act of 1855 above referred to, is repealed by any subsequent act, and that the school district thereby established, remains an independent school organization, subject only to the law creating it. It is not pretended that there is any express repeal of the sections 5 and 6 of the charter of the Academy; but it is urged that they are inconsistent with the constitution subsequently adopted, and the laws passed pursuant thereto relating to a system of public instruction, and especially the act of 1868.

Gratuitous instruction and taxation as the means of sustaining it are the leading features of the new constitution which are sought to be carried into effect by the act referred to. The immediate administration of the system is confided to directors of townships, and township Boards of Education. The former are required, among other duties, to take an enumeration of all the white and colored youth between certain ages resident in the sub-districts, and report the same together with a list of tax-payers of such district to the township clerk. They are also required to forward to the proper officer, in each year, an estimate of the funds necessary to sustain the schools in their respective sub-districts for a period of not less than four nor more than six months. All property in the district is liable to taxation for school purposes. The public school moneys are to be apportioned among the districts according to the enumeration and returns furnished the county clerks, etc. Those and other provisions that need not be mentioned, show an intention to establish a school system on a basis which admits of no such exemption from the burdens it imposes, as is claimed by the plaintiff.

The charter of the academy is peculiar in constituting the *stockholders* a *school district;* and while entitling them to a a share of the public moneys, exempts them from taxation for school purposes. Any one may become a stockholder by subscribing and paying a sum not exceeding ten dollars. There is no limit to the number, nor as to the place of their residence. It is obvious that an institution thus organized, having no congruity with the general school system, and yet not claiming entire freedom from its control, would introduce confusion into its administration and impair the efficiency and usefulness of the system, at least within the sphere of its operation.

If the members of the corporation are exempt from liability to contribute their due share of taxes for the support of schools in the district by virtue of being stockholders, it is not improbable that the provision in regard to free schools might become nugatory, or that the tax-payers who are not stockholders would be subjected to improper burdens by reason of such exemption, in order to sustain them. Other provisions might be pointed out showing a like repugnancy between the two acts.

The repeal of the sections referred to which are inconsistent with the general law, leaves the institution a complete corporation without these provisions; and it has all the powers necessary to the attainment of the primary objects of the charter. Judgment affirmed. The other judges concur.

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THOMAS W. PRIEST, Administrator of ELIZA E. SMARR, deceased, Defendant in Error, *vs.* ANN F. MCMASTER, administratrix of SAMUEL H. K. MCMASTER, deceased, Plaintiff in Error.

1. *Practice, civil—Orders, nunc pro tunc—Subsequent terms—Record.*—Where a Court fails to make an order, it cannot be made at a subsequent term *nunc pro tunc;* but where the clerk fails to enter judgment, or enters up the

wrong judgment, the Court may at any time order the proper entries to be made, but the record should show the facts which authorize the entries.

Error to Macon Circuit Court.

Anderson & Boulware and Wm. P. Harrison, for Plaintiff in Error.

I. An amendatory or *nunc pro tunc* entry can be made after the term at which the proceeding was had, and after the matter had ceased to be *in fieri*, only when the record itself, or at most entries *quasi* of record, such as those made by the Judge upon his docket, or the clerk upon his minute book, discloses what actually took place. (Moody vs. Grant, 41 Miss., 565; Makepeace vs. Lukens, 27 Ind., 435; Summersett vs. Summersett, 40 Alabama, 596; Harris vs. Martin, 39 Ala., 556; DeCastro vs. Richardson, 25 Cal., 49; Wilson vs. McEvoy, 25 Cal., 169; Wallahan vs. People, 40 Ills., 103; West vs. Galloway, 33 Ala., 306; Courson vs. Herrin, 33 Ala., 553; Swain vs. Naglee, 19 Cal., 127; Price vs. Likens, 23 Texas, 635; Dickson vs. Hoff, 3 How., (Miss.) 165; State vs. Fields, Peck., (Tenn.) 140; Davis vs. Ballard, 7 Monroe, 604; Morrison vs. Dapman, 3 Cal., 255; Bondurant vs. Thompson, 15 Ala., 202; Kitchen vs. Moye, 17 Ala., 143; Metcalf vs. Metcalf, 19 Ala., 319; Boon vs. Boon, 8 Smedes and Marsh, 318.)

In all cases in which an entry *nunc pro tunc* is made, the record should show the facts which authorize the entry. (Gibson vs. Chouteau's Heirs, 45 Mo., 171; Hyde vs. Curling, 10 Mo., 359.)

Hall, for Defendant in Error.

The change in the title of the case on the record and on the docket shows conclusively that the " Administrator of Smarr, had been substituted.

WAGNER, Judge, delivered the opinion of the court.

The record in this case raises but one single point and that is the action of the Court in sustaining the plaintiff's motion for a *nunc pro tunc* entry of appearance by the administrator;

as to the propriety of the subsequent judgment, there can be no question.

The case shows that Eliza E. Smarr filed in the Probate Court of Marion County a claim against the estate of McMasters, and after judgment in that court the cause was appealed and thence transferred by change of venue to the Macon County Circuit Court. During the pendency of the case in the Circuit Court, Mrs. Smarr died, and Priest the plaintiff became her administrator. The parties appeared at the September term 1870, a trial was had and judgment rendered for plaintiff. No objections were made or exceptions taken. At the September term 1871, the defendant appeared in court and made a motion to set aside the judgment because Smarr's administrator had not been properly made a party to the suit. The Court then at the instance of the plaintiff ordered an amendment of the record *nunc pro tunc* showing an appearance of the plaintiff as administrator of Smarr as of the September term 1869.

The power of a Court to order *nunc pro tunc* entries in furtherance of justice, is too well settled to require the citation of authorities. (Gibson vs. Chouteau's Heirs, 45 Mo., 171, and cases referred to.)

Where the Court has omitted to make an order, which it might or ought to have made, it cannot at a subsequent term be made *nunc pro tunc*. But where the clerk fails to enter judgment, or enters up the wrong judgment, the Court may correct the error, and order the proper entries to be made at any time. But in all cases the record should show the facts which authorize the entry.

The question then is, does the record show such a state of facts as to warrant the Court in making the amendment and correction. The minutes kept by the clerk, and the entries on the judge's docket both show that previous to 1869 the cause was entitled and the proceedings were had in the name of Smarr against McMasters, but subsequent to that time both the judge and the clerk entitled the cause and made their entries as Priest, administrator of Smarr against McMasters.

This shows very clearly to my mind that the death of Smarr was suggested, and that Priest the administrator came into court and had his appearance entered and was, I think sufficient record evidence to amend by.

In my opinion the judgment should therefore be affirmed. The other judges concur.

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ZACHARIAH ROBINSON, Appellant, *vs.* SUSAN BROWN, *et al.*, Respondent.

1. Judgment affirmed.

Appeal from Linn County Court of Common Pleas.

Easley & Burgess, for Appellant.

A. W. Mullins, for Respondent.

ADAMS, Judge, delivered the opinion of the court.

This was a suit for partition of land. Three commissioners were appointed to make the partition, two of whom agreed upon a report dividing the land in kind amongst the parties. The other commissioner reported that he did not agree to the report and did not consider that a just division had been made.

The majority report was confirmed and final judgment entered.

The plaintiff Robinson moved to set aside the majority report upon the alleged ground that there was not an equal division of the lands according to the rights of the parties; a number of affidavits were read upon the trial of the motion and both sides introduced evidence to set aside and sustain the report. The evidence was contradictory, and upon the whole evidence the court sustained the report of the majority.

I have examined the evidence and see no sufficient reason to interfere with the finding and judgment of the Court.

Judgment affirmed. The other judges concur.

JOHN FOLEY, Plaintiff in Error vs. JAMES M. JONES, Defendant in Error.

1. *Limitations, statute of—Sheriff—False return—When the statute begins to run*—Where a sheriff falsely returns that he has served the defendant to a suit, he thereby commits a fraud against such defendant, and the Statute of Limitations does not begin to run from the time of such return. (2 W. S., p. 920, § 24.)

Error to Clay Circuit Court.

Woodson & Lincoln and Samuel Hardwick, for Plaintiff in Error.

Plaintiff could not bring his suit until he knew he had a right of action; and the improper act of defendant prevented his knowing it. (2 W. S., 920, § 24; Arnold vs. Scott, 2 Mo., 14; Harper vs. Pope, 9 Mo., 402; The First Massachusetts Turnpike Corporation vs. Field. *et al.*, 3 Mass., 201; Homer vs. Fish, *et al.*, 1 Pick., 435; Titus Wells, Exe'r, &c., vs. Fish & Winsor, 3 Pick., 74; Stephens vs. St. Louis National Bank, 43 Mo., 388; Angell on Limitations, § 186.)

Where an improper act of defendant prevents the commencement of an action against him, he cannot claim the benefit of the statute. (Smith Adm'r. vs. Newbey, 13 Mo., 165.)

J. W. Jenkins, for Defendant in Error.

The statute commences to run from the time of the return. (Bank, &c. vs. Childs, 6 Cow., 238; Miller vs. Adams, 16 Mass., 456; Caesar vs. Bradford, 13 Mass., 169.)

Want of knowledge of the facts necessary to enable the plaintiff to bring suit, does not prevent the statute from running. (Smith vs. Newbey, 13 Mo., 159; Troup vs. Smith, 20 Johns., 33; Granger vs. George, 5 Barn & Cress, 149; Leonard vs. Pitney, 5 Wend., 30; Allen vs. Mille, 17 Wend., 202; Short vs. McCarthy, 3 B. & A., 626; Brown vs. Howard, 2 B. & B., 75.)

The return of a writ by the sheriff is a part of the public record of the Court, and imparts notice of what it contains to the whole world. (Stephens vs. Beckes, 3 Blackford, 88; Ballantine on Lim., 92, 96.)

The plaintiff is chargeable with knowledge of the facts, if it

was within his reach, which it clearly was in this case. (Farnam vs. Brooks, 9 Pick., 212; Cole vs. McGlathry, 9 Greenleaf, 131.

WAGNER, Judge, delivered the opinion of the court.

This was an action brought against the defendant, who was formerly Sheriff of Clay County, for making a false return.

The petition states in substance that on the 22nd day of April, 1860, plaintiff and others became bound as indorsers on a note for one Michael B. Rice, for the sum of two hundred dollars, which was negotiated to the Farmers' Bank of Missouri; that on the 22nd day of March, 1866, said bank instituted suit on said note against said parties and against the plaintiff; that summons was issued in said cause and placed in the hands of the defendant, then Sheriff of Clay County, on the 23rd day of March 1866; that the defendant on the 7th day of April, 1866, made the following false and fraudulent return: "I certify and make return that I executed the within writ, by delivering a true copy of the petition and writ to Michael B. Rice." That he also on the same day made the following false return on said writ: "I further certify and make return that on the day above named, I executed the within writ by delivering a copy of the writ to Andrew Foley, Thomas I. Kidd and John Foley," &c.

The petition then alleges that defendant did not serve said writ on any of the defendants therein named, and particularly that he failed in any manner whatever to serve the same on plaintiff. That plaintiff had no knowledge that such a suit was instituted, and that defendant failed to notify him as required by law. That on the 28th day of April, 1866, judgment was rendered in said cause for two hundred and seventy four dollars. That the first notice plaintiff had of the pending of said suit, or of the judgment, was in 1869, when money in the Commercial Savings Bank, in Liberty Mo., to the credit of plaintiff was garnished and collected, and applied to the payment of said judgment, on the — day of — 1869. That plaintiff had a meritorious and just defense to said ac-

tion at the time of the commencement thereof, which he could have made fully appear to the court if he had been summoned; that said note had been paid off by plaintiff in August, 1861, (setting forth the manner in which it was paid;) that he could have made that fact appear and have successfully defended against said note but for the false return made by the defendant, by reason of which false return he was damaged in the sum of four hundred and fifty dollars, for which he asks judgment.

This action was commenced March 3, 1871.

Defendant filed his answer, pleading first the statute of limitations, that more than three years had elapsed between making the return, and the bringing of the action. He then denied that he made a false return, and denied that plaintiff could have successfully defended the action.

Plaintiff filed a replication denying the charge that the right of action did not accrue within three years; alleged that the payment by plaintiff of the money he was compelled to pay by reason of the false return, was not paid until about the month of October 1869, and that plaintiff had no notice of the institution of said suit till his money deposited in the bank was garnished, which was in October 1869, and within three years before the commencement of this action. The cause being called for trial, the plaintiff proposed to prove by witnesses and by records all the facts as charged in his petition, to the admission of which testimony, defendant objected on the ground that defendant was entitled to a judgment on the pleadings in the case, as they did not state facts sufficient if true, to take the case out of the statute of limitations, and that the demand was barred by the statute; which objections the court sustained, and then gave judgment for defendant.

The only question presented for our determination is, wheth er the action is barred by the statute of limitations. The statute provides that after the lapse of three years no action shall be brought against a Sheriff, Coroner, or other officer upon a liability incurred by the doing of an act in his official capacity, and in virtue of his office, or by the omission of an official duty. (2 W. S., p. 918, § 11.)

But it is further provided that if any person by absconding or concealing himself, or by any other improper act, prevent the commencement of an action, such action may be commenced within the time limited therein, after the commencement of such action shall have ceased to be so prevented. (*Ibid*, p. 920, § 24.)

It may be conceded that the statute does not protect plaintiffs who are ignorant of the facts necessary to enable them to bring suits unless that ignorance is occasioned by some improper conduct on the part of defendants. If the defendant absconds or conceals himself, or does any other improper act to prevent the commencement of an action, he is not within the protection of the statute. If he has not done any of these things then he is protected, although the plaintiff may have been guilty of no laches. The making of a false return is unquestionably an improper act, but that of itself would not prevent the commencement of an action. But coupled with other acts it might produce that result, and exclude the officer making it from the protection of the statute. As a general proposition, and as to parties to the suit, the statute would commence running from the time of making the return, because then the parties are in court, and would be bound to take notice of it But when no notice has been served, and a false return is made, the party, in effect, is a stranger to the proceeding, though bound by the return as a party to the record. He has nothing to put him upon inquiry, and laches is not properly imputable to him. The officer by his improper conduct commits a fraud upon him, and by concealing the fact that a false return has been made, prevents him from commencing an action. It is not to be supposed that a party who has had no notice that an action has been commenced against him, will continually visit the clerk's office for the purpose of ascertaining whether he has been sued and whether the sheriff has made a return of service, when in fact there has been no service. If a judgment is obtained against a party without his knowledge on a false return, he is prevented from bringing suit because he knows nothing about the fact, and

the officer by his fraudulent and improper act has thrown him off his guard, and closed up all motive to inquiry. We are aware that a strict literal reading of the statute might lead to a different view. But we think that the construction that we have arrived at, manifestly carries out the spirit and intention of the law, and promotes the ends of justice.

It follows that the Court erred in holding that on the pleadings the plaintiff was barred by the statute, and with the concurrence of the other judges its judgment will be reversed and the cause remanded.

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SANFORD B. GARNER AND WIFE, Defendant in Error *vs.* JONATHAN JONES, Plaintiff in Error.

1. ***Lands and land-titles—Conveyances—Husband and wife—Joint-tenancy.***—A conveyance of real estate in fee to husband and wife creates a tenancy by the entirety with the right of survivorship.

Error to Buchanan Circuit Court.

S. Woodson, for Plaintiff in Error, cited: Gibson vs. Zimmermann, 12 Mo., 385; Shaw, *et al.*, vs. Hearseys, 5 Mass., 521; Fox vs. Fletcher, 8 Mass., 274; Torrey vs. Torrey, 14 N. Y., 430; Wright vs. Saddler, 20 N. Y., 320.

J. W. Strong, for Defendant in Error.

This was a conveyance of land by a father to his daughter and her husband, which was intended as an advancement or gift to the daughter, and hence it vested no estate in the husband, except as trustee for his wife. (Tyler on Infancy and Coverture, page 494; Barncord vs. Kuhn, 36 Penn. St., R., 383.)

ADAMS, Judge, delivered the opinion of the court.

The following statement has been agreed upon by both parties and forms the basis of this opinion.

This was a suit in ejectment in the Circuit Court of Buchanan County, in which the plaintiffs seek to recover possession of certain real estate described in their petition.

The defendant filed his answer, admitting that he was in possession, but claiming title.

The cause was submitted to the court on the following agreed statement of facts, viz:

That on and before the 19th day of July, 1851, one George L. Holden was seized and possessed in fee simple of the land in dispute; that on said day said Holden made a deed in words and figures as follows, viz:

"This deed, made this 19th day of July, 1851, by George L. Holden and Emily J. Holden, his wife, of Buchanan County, Missouri, party of the first part, and Mary C. Munson and Henry L. Munson, her husband, of the county of Buchanan, in the State of Missouri, parties of the second part, Witnesseth: That the said party of the first part, in consideration of the natural love and affection which they have and bear to the said Mary C. Munson, being the daughter of the said George L. Holden, and the further consideration of one dollar to them paid, the receipt of which is acknowledged, have given, granted, bargained and sold, and do sell and convey to the said party of the second part, and to their heirs and assigns, forever, the following lands in the county of Buchanan, in the State of Missouri, viz: Three acres off the north end of the north-west quarter of the north-west quarter of section seven (7), of township fifty-four (54), in range thirty-four (34.) (The above described tract of land is given to the party of the second part by way of advancement, and is valued and charged them at eighteen hundred and fifty dollars,) together with all the appurtenances thereto belonging.

"To have and to hold the above described land to the said party of the second part, their heirs and assigns, forever.

"In witness whereof, said parties have hereto subscribed their names and affixed their seals, this 19th day of July, A. D. 1851.

GEORGE L. HOLDEN. [SEAL.]
EMILY J. HOLDEN. [SEAL.]"

This deed was acknowledged in due form, and duly recorded.

It is further agreed that Henry L. Munson and Mary C. Munson, his wife, who was the daughter of said George L. Holden, were put into possession of said land, pursuant to said deed, and that they continued in possession of it until the 9th day of December, 1863, when Mary C. Munson died, leaving Arabella Munson, now Garner, intermarried with Sanford B. Garner, her only child.

That said Henry L. Munson continued in possession of said land until the month of June, 1865. That on the 7th day of March, 1865, said property was sold at Sheriff's sale, under an execution issued upon a judgment rendered in favor of George B. Dykes, and against said Henry L. Munson.

That at said Sheriff's sale, defendant, Jonathan Jones, was the purchaser, for the sum of $25.

That by virtue of said sale and the deed made pursuant thereto to defendant, Jonathan Jones, all the title or interest which said Henry L. Munson had in and to said land, was conveyed to defendant, Jonathan Jones, and no more.

That said Jonathan Jones took possession of said lands after said purchase at Sheriff sale, and has continued in possession ever since. That on the 20th day of November, 1871, said Henry L. Munson died.

That plaintiff, Arabella Garner, is the sole heir of said Mary C. Munson, and that plaintiff, Sanford B. Garner, is her husband.

The above are all the facts upon which the cause is submitted.

The cause was submitted to the court on that statement of facts, and judgment was given for plaintiffs.

Defendant excepted, and filed his motions for new trial and in arrest of judgment, which being overruled, exceptions were taken and the case is brought here by writ of error.

Giving judgment for plaintiffs, and overruling defendant's motion for a new trial and in arrest of judgment, are assigned for error. It is evident from this statement that the whole controversy depends upon the proper construction to be given the deed from Holden and wife to Munson and wife.

1. At common law a conveyance in fee to husband and wife, of real estate, created a tenancy by the entirety. Being but one person in law, they took the estate as one person. Each being the owner of the entire estate; neither of whom had any separate or joint interest but a unity or entirety of the whole. So if either died the estate continued in the survivor, as it had existed before; an undivided unity or entirety. There was no survivorship as in joint tenancies, but a continuance of the estate in the survivor as it originally stood. The only change by death was in the person, not in the estate. Before death they both constituted one person holding the entire estate, and after the death of either the survivor remained as the only holder of the estate. This principle was introduced into this State as a part of the common law and it has not been altered by our statute of conveyances. (See Gibson vs. Zimmermann, 12 Mo., 385.) It is also the settled law of most of the States of the Union where it has not been changed by statute. (Tyler on Infancy and Coverture, 498; Lux vs Hoff, 47 Ills., 425.)

2. It is urged here, however, that this deed created a trust estate for the sole and separate use of Munson's wife. To constitute a separate estate for the use of a married woman, the deed must contain apt words manifesting such intent. There are no words in this deed showing that it was the intention of the grantor to secure this property to his daughter for her sole and separate use. It appears from the face of the deed to be an advancement, but a simple advancement does not constitute a separate estate. A gift of personal property to a married daughter by way of advancement, without any intention expressed, to secure it to her separate use becomes the absolute property of the husband by virtue of his marital rights.

So if the advancement consists in real estate and the deed be made to the husband and wife and no intention is manifested to secure it to the separate use of the wife, it must bear the same construction as any other deed made to husband and wife. The case of Barncord vs. Kuhn (36 Penn. R., 383,) inti-

mating a contrary doctrine, must have been controlled by the statute of 1848 concerning married women. Prior to this decision the common law doctrine was firmly established in that State. (See Stuckey vs. Keefe's Executor, 26 Penn. St., 397; Vide also Fairchild vs. Chastelleux, 1 Penn. St., 176; Bates vs. Seely, 46 Penn. St., 248.)

It may be conceded that if a husband invests the separate funds of his wife in real estate and takes a deed to them jointly, a court of equity would protect her in the enjoyment of the property and declare a trust in her favor. But no such point arises in this case. This is a plain deed made to husband and wife as an advancement to her without any words securing it to her sole and separate use. Under this view, at her death the estate remained in the husband as an entirety and her heir took nothing by descent. (Lux vs. Hoff, 47 Ills., 425.)

The judgment must be reversed and the cause remanded.

The other Judges concur.

GEORGE R. G. BEAUCHAMP, *et al.*, Plaintiffs in Error, *vs.* STEPHEN R. SHRADER, Defendant in Error.

1. Garner vs. Jones, *ante*, p. 68 affirmed.

Error to Clay Circuit Court.

Samuel Hardwick, for Plaintiffs in Error, cited: Barncord vs. Kuhn, 36 Penn. Rep., 383; Taylor on Infancy and Covertufe, p. 494, 502.

Richards and Sandusky, for Defendants in Error.

Land conveyed to husband and wife passes to survivor. (Gibson vs. Zimmerman, 12 Mo., 385; Bates vs. Seeley, 46 Penn. State, 248; Babbit vs. Scroggin, 1 Duval, Ky., 272.)

There is no resulting trust in favor of the wife and her heirs. (Lux vs. Hoff, 47 Ill., 425; Farmers Bank vs. Gregory, 49 Barb., 155.)

ADAMS, Judge, delivered the opinion of the court.

This was a suit in ejectment to recover possession of certain lands described in the petition. The defendant answered, admitting his possession, but claiming title to the premises.

Upon the trial, the following facts were agreed on, viz: That on the 7th day of July, A. D. 1851, one James T. V. Thompson, was seized and possessed in fee simple of the lands sued for. That on said day said Thompson executed and delivered a deed, in words and figures as follows, viz:

"This indenture made and entered into this 7th day of July, A. D. 1851, by and between James T. V. Thompson and Emily W. Thompson his wife, of the county of Clay in the State of Missouri, of the first part and Eliza Shrader and Stephen R. Shrader, her husband of the County and State aforesaid of the second part, Witnesseth: That the said party of the first part, for and in consideration of the natural love and affection which they have and bear for the said Eliza Shrader—being the daughter of the said James T. V. Thompson, and for the further consideration of one dollar to them, the said party of the first part, by the said party of the second part paid, the receipt of which is acknowledged, have given, granted, bargained and sold and by these presents do give, grant, bargain, sell, alien and convey unto the said party of the second part and to their heirs and assigns forever, certain tracts or parcels of land lying and being in the county of Clay and the State of Missouri, viz: (here the land is described as in the petition.) "(The above tract of land is given to the said party of the second part by way of advancement and is valued and charged to them at two thousand two hundred and fifty dollars) together with all and singular the appurtenances thereunto belonging, or in any wise appertaining. To have and to hold the above described pieces or parcels of land, with all the appurtenances thereto belonging or any wise appertaining, to the only proper use, benefit and behoof of them, the said party of the second part, and their heirs and assigns forever. And the said party of the first part, for themselves, their heirs and executors and administrators, covenant to and with the said party of the

second part and their heirs and assigns, that the above described tracts, pieces or parcels of land, and every part or parcel thereof, they will warrant and forever defend the same, against all claims of whatever nature to them, the said party of the second part and their heirs and assigns, forever.

In witness whereof, the said parties of the first part have hereunto set their hands and seals, this 7th day of July, A. D. 1851.

Signed, JAMES T. V. THOMPSON.
EMILY W. THOMPSON.

This deed is acknowledged in due form before the Circuit Clerk of Clay county, and filed for record on the 24th day of September, A. D. 1851, and duly recorded in record book M. p. 308. of the records of Clay county.

It is further agreed, "that Shrader and his wife were put into possession of said property, pursuant to said deed, and so continued until the 15th day of November, A. D. 1863; that on said day Eliza Shrader died; that she was the wife of Stephen R. Shrader and daughter of said Thompson; that since said time Shrader has been in possession of said land, and was in possession at the time of the institution of this suit. That the plaintiffs are the sole heirs of Eliza Shrader."

The plaintiffs asked the following declarations of law, which were refused:

1st. That the defendant does not take said property by survivorship, upon the death of Mrs. Shrader.

2d. That the facts show that plaintiffs are entitled to the possession of the property.

The defendant asked the following declarations of law, which were given:

1st. That under the deed from Thompson to Shrader and his wife, they had a joint estate, and upon the death of Mrs. Shrader, Stephen R. Shrader, her husband, took the same by survivorship.

2d. That the facts agreed upon show no title in plaintiffs in this cause.

The court gave judgment for the defendant.

Motion for new trial and in arrest of judgment were filed and overruled. Exceptions taken and the case is brought here by writ of error.

Refusing instructions asked by the plaintiffs; giving those asked by defendant; giving judgment for defendant, and overruling plaintiffs' motions for new trial and in arrest of judgment, are assigned for error.

The only question presented by this record is the proper construction of the deed from Thompson and wife to Shrader and wife. This deed in all its features is substantially the same as the deed passed on by this court in the case of Garner and wife, vs. Jones, decided at the present term of this court, and the law as laid down in that case must govern this. Under this view the judgment must be affirmed. The other judges concur.

THE COUNTY OF LINN AND THE STATE OF MISSOURI for the use of Linn County, Respondents, *vs.* W. C. FARRIS, *et al.*, Appellants.

1. *Bonds—Escrow—Execution of—Principal parties.*—Where A. procured the signature of B. as his surety on a bond, B. signing it on condition that C.'s signature should also be procured to it by A.; but C.'s signature was never procured, but his name was forged on the bond; in a suit by the obligee on the bond, *Held*; that there was no delivery by B., and the bond was void as to him.
2. *Bonds—Creditors—Sureties—Fraud of principal in execution.*—When a principal procures the signatures of sureties to his bond by fraud, of which the creditor is ignorant, the remedy of the sureties is against the principal and not against the creditor.

Appeal from Linn Circuit Court.

A. W. Mullins and G. D. Burgess, for Appellants.

When one surety has signed a bond on condition that it shall be signed by another before its delivery no obligation is incurred until the condition shall happen, and it may be delivered to the principal in the bond to remain as an escrow, as

well as to any other person. (State, *ex rel.*, Moore vs. Sandusky, *et al.*, 46 Mo., 377; Pepper vs. State, 22 Ind., N. Y., 399; The People vs. Bostwick, 43 Barb., 9; see same case 32 445; Bagot vs. State, 33 Ind., 262; Pawling vs. United States, 4 Cranch., 219; Judge Redfield's note to Seely vs. People, 2, Am. L. Reg., N. S. 1862–1863, pp. 346-347; Perry vs. Patterson, 5 Humph., 133; Fletcher vs. Austin, 11 Vermont, 447; Duncan vs. United States, 7 Peters, 435, 447–448; The United States vs. Seffler, 11 Peters, 86.)

Boardman, for Respondent.

A paper to be delivered as an escrow must be delivered to a stranger. This is the very definition of an escrow. (1 Bouv. Law Dict., 519.)

Adams, Judge, delivered the opinion of the court.

This suit was upon the official bond of the defendant Hoyle as treasurer of Linn County.

David Beals was sued as one of the sureties and died during the progress of the suit, and it was revived against the appellants as his administrators. The administrators set up as a defense in their answer that their intestate, Beals, at the time he signed the bond, expressly agreed with the principal Hoyle that he, Hoyle, was to procure the signatures of Dart, Wright, Leavill, Maddox and Good to the bond, and that he was to retain the bond in his hands as an escrow, not to be delivered at all unless the other parties named also executed it as securities. That Hoyle never did procure the signature of Leavill but that Leavill's name was signed thereto without his knowledge or consent, and that the bond was afterwards delivered to Linn County without the knowledge or consent of their intestate, Beals.

This answer was, on the motion of plaintiff, stricken out, and exceptions were duly saved to this action of the court; and afterwards final judgment was rendered against the appellants for want of answer, from which they have appealed to this court.

The defense set up in this answer amounts to a plea of *non est factum*. To constitute a valid execution of a bond, deliv-

ery with the intention that it shall be the bond of the obligor, is essential. This answer sets up a conditional delivery, not to the obligee, nor to any agent of the obligee, but to the principal in the bond, with the express condition that it was not to be the bond of Beals till the other parties named as sureties should duly execute it. This condition was not complied with in regard to Leavill.

From this answer the name of Leavill seems to have been forged, and as it was one of the conditions of the delivery that all of the named parties should execute it, the omission to procure the genuine signature of Leavill or his assent to its execution, rendered the bond invalid as to the intestate. The true ground is that he has never executed the bond. One essential requisite to its due execution was wanting. An absolute delivery as the bond of the intestate. There was no delivery of this bond as the bond of the intestate.

When a principal, not acting as agent of a creditor, fraudulently procures the execution of a bond by sureties, the remedy of the sureties in such case is against the principal and not the creditor who did not participate in the fraud. But this is not that case. Here there was no valid execution of the bond at all. The delivery was conditional, and it could not become the bond of the surety till this condition was performed. (State, *ex rel.*, Moore vs. Sandusky, *et al.*, 46 Mo., 377; Gasconade County, &c., vs. Sanders, *et al.*, 49 Mo., 192; Briggs vs. Ewart, 51 Mo., 245; Cutter vs. Whittemore, 10 Mass., 442; Pepper vs. State, 22 Ind., 399; Bagot vs. State, 33 Ind., 262; People vs. Bostwick, 43 Barb., 9; same case, 32 N. Y., 445; Pawling vs. United States, 4 Cranch 219; Duncan vs. United States, 7 Peters, 435; United States vs. Leffler, 11 Peters, 86; Seely vs. People, 27 Ills., 175.)

Under this view the judgment must be reversed and the cause remanded. The other judges concur.

N. B. HAMILTON, Respondent, *vs.* ABR. MARKS AND HIRAM BLACK, Appellant.

1. *Bills and notes—Assignment before maturity—Notice—Equitable defenses.*—In order to let in equitable defenses against a note assigned before maturity, express notice of the consideration before the assignment was made, is not indispensable; but it will be sufficient if the circumstances are of such a strong and pointed character as necessarily to cast a shade upon the transaction and to put the holder on inquiry.

Appeal from the Linn County Court of Common Pleas

A. W. Mullins, for Appellant.

If the maker prove the note had been obtained from him by fraud, or was fraudulently put in circulation by the payee, the holder must prove that he took it honestly, without knowledge of the fraud. (Story on Promissory Notes (5th Ed.) § 196, and note; 1 Parsons on Notes and Bills, 188, and note (*h*); Bailey vs. Bidwell, 13 Meeson & Welsby, 73; Woodhull vs. Holmes, 10 John., 231; Vallett vs. Parker, 6 Wend., 622; Small vs. Smith, 1 Denio, 583, 586; Monroe vs. Cooper, 5 Pickering, 412; Vathir vs. Zane, 6 Gratt., 246; Ross vs. Bedell, 5 Duer., 462; Catlin vs. Hansen, 1 Duer., 322; Devlin v. Clark, 31 Mo., 22; Renshaw vs. Wills, 38 Mo., 201; McKesson vs. Stanbury, 3 Ohio St.. 156; Sandford vs. Norton, 14 Vt., 228; Stalker vs. McDonald, 6 Hill., 93.)

Whatever is notice enough to excite attention, and put a party on his guard and call for inquiry, is notice of everything to which such inquiry might have led. (Story on Bills, (4th Ed.) § 194; 3 Kents Com. Marg., pp. 79, 82; 1 Parsons N. and B., 257, 259; Renshaw vs. Wills, 38 Mo., 201; Devlin vs. Clark, 31 Mo., 22; Goodman vs. Simonds, 19 Mo.. 106; Rhodes vs. Outcalt, 48 Mo., 367; Speck vs. Riggin, 40 Mo., 405; Louisiana St. Bk., vs. The N. O. Nav. Co., 3 La. An., 294; Kennedy vs. Green, 3 Mylne & Keen., 719; Cone vs. Baldwin, 12 Pick., 545; Gould vs. Stevens, 5 Am. R., 265; (43 Vt. 125.) Howard vs. Kimball, 6 Am. R., p. 740. (65 N. C., 175.)

G. W. Easley, for Respondent.

The holder of a negotiable note, for value, without notice,

can recover it, notwithstanding that he took it under circumstances which ought to excite the suspicion of a prudent man.

In order to destroy such holder's title, it must be shown that he took it *mala fide*. (Story on Bills, § 416; Edwards on Bills, 506; 2 Parsons on Bills, 277, 278, 279; Story on Prom. Notes, (Ed. of 1868,) § 382; Swift vs. Tyson, 16 Peters, 1; Goodman vs. Simonds, 20 How., 343; Bank vs. Neal, 22 How., 96; Murray vs. Lardner, 2 Wall., 110; Brush vs. Scribner, 11 Conn., 388; Redfield's Leading cases on Notes and Bills, 257; Phelon vs. Moss., 67 Pa., 59; Magee vs. Badger, 34 N. Y., 247; Bank vs. Hoge, 35 N. Y., 65.)

All the cases to the contrary were based upon Gill vs. Cubitt, 3 B. & C., 466; (10 Eng. Com. Law Rep., 144,) which has been overruled by Goodman vs. Harvey, 4 Adolph & Ellis, 870; (31 Eng. Com. Law Rep., 381.)

ADAMS, Judge, delivered the opinion of the court.

This was an action on a promissory note, executed by the defendants, to one T. H. Cooley, and by Cooley assigned to plaintiff before maturity. The separate answers of the defendant Marks set up a conditional sale of a farm to him by Cooley, that the conveyance was made to him for the purpose of making the sale to one Walker, and that the note was executed simply to secure Cooley in the faithful discharge by Marks of the trust; and that in case no sale should be made to Walker before maturity of the note, the note was to be void.

This answer also set up a fraudulent conspiracy between Walker and Cooley to sell the farm to Marks, and charged the defendant with notice of the fraud, etc. The answer also set up what the consideration of the assignment was, and that it was not for value, etc.

The plaintiff replied, denying specifically all the material allegations of the answer.

Both parties gave evidence conducing to establish their respective sides of the case.

The jury found a verdict for the plaintiff for something less

than the amount of the note, and a motion for a new trial was made and overruled.

The only point which we are called upon to review, grows out of the instructions given for the plaintiff and the second instruction of defendant's, refused by the court. The refused instruction reads: "The Jury are instructed, that if they believe from the evidence that the note sued on was obtained by Cooley from the defendant Marks by fraud practiced upon him by said Cooley; then in order to affect the plaintiff with such fraud, it is not necessary that he should have had actual and positive knowledge of such fraud, before the assignment of said note to him; but that is sufficient notice if it be such as men usually act upon in the ordinary affairs of life."

The objection urged against this instruction, is, that the assignee of a negotiable note before maturity must have actual or express notice of any alleged infirmity or fraud in the execution or consideration of the note, and that circumstances which ought to put a prudent man on inquiry are not sufficient notice to invalidate the note in his hands.

Judge Story in his work on Promissory Notes uses this language: "It is agreed on all sides, that express notice is not indispensable; but it will be sufficient if the circumstances are of such a strong and pointed character as necessarily to cast a shade upon the transaction, and to put the holder on inquiry." (Story on Promissory Notes, § 197.) This doctrine as here laid down, was the established law of England for a long time, but recently the English Courts have abandoned it, upon the alleged ground of its inconvenience, and its obstruction to the free circulation of negotiable paper. But in America the recent English Rule has been denied and the old doctrine declared to be too long and firmly established, to be now shaken or overruled.

In Pringle vs. Phillips, 5 Sand. R., (N. Y.) 157, Judge Duer in a very elaborate opinion, reviews the cases of Crook vs. Jadis, 5 B. & Ad., 909; Backhouse vs. Harrison, 5 B. & Ad. 1098; Goodman vs. Harvey, 4 A. & E. 870, which overruled the prior English cases, and very clearly shows that the

old doctrine has too solid a foundation in principle, to be now overturned or shaken by their recent English decisions. Whatever respect we may have for the learned tribunal, by which those cases were decided, we think they ought not to be regarded as evidence of the law which the American Courts are bound to follow.

We think the old doctrine is the better rule, and is supported by the weight of authority and reason both in England and America. (See Gill vs. Gubitt, 3 B. Cressw. 466.) Snow vs. Peacock and others, 3 Ring, 406; Haynes vs. Foster, 4 Tyrwhitt, 65; Beckwith vs. Corrall, 3 Bing, 444; Snow vs. Saddler, 3 Bing, 610; Estrange vs. Wigney, 6 Bing, 677; Easley vs. Crockford, 10 Ring, 243; Wiggins vs. Bush, 12 Johns. 306; Ayer vs. Hutchins, 4 Mass., 370, Cone vs. Baldwin, 12 Pick., 545; Hall vs. Hale, 8 Conn., 336; Home vs. Karsper, 5 Binn, 469; Sandford vs. Norton, 14 Vermont, 228; Nicholson vs. Patton, 13 Louis, 213.)

For these reasons we think the court erred in refusing the second instruction asked by the defendants, and the court also erred in the instructions given for the plaintiff, which required actual notice on his part of the alleged fraud or infirmity in the execution or consideration of the note.

The judgment will therefore be reversed and the cause remanded. The other judges concur.

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J. S. Newmeyer and John B. Clark, Appellants, *vs.* The Mo. & Miss. R. R. Company, *et al.*, Respondents.

1. *Practice, civil—Equity, bills in—Parties—Courts, County, acts of Tax-payers rights of—Attorney General.*—Tax-payers can file bills in equity to annul illegal acts of County Courts, when such acts will increase the taxation, and the State is not a necessary party to such suits.

Appeal from Macon Circuit Court.

James Carr, for Appellants.

I. In case of misfeasance or malfeasance of the County Court, a tax-payer or tax-payers may bring a suit on behalf of himself or themselves, and all others similarly interested. (Hooper vs. Ely, 46 Mo., 505; Steines vs. Franklin County, *et al.*, 48, Mo., 176; Wood vs. Draper, *et al.*, 24 Barb. 187; DeBaun vs. The Mayor, &c., of New York, 16 Barb. 392; Stuyvesant vs. Pearsall, *et al.*, 15 Barb. 244; Milhau vs. Sharp, Barb. pp. 218, 219; Christopher vs. Mayor, &c., of New York, 13 Barb. 567; Shephard vs. Wood, *et al.*, 13 Howard, Pr. 47; 2nd, Redfield Railways 362; Burt vs. British Life Insurance Association, 5 Jur. N. S. 612; Mandaville vs. Riggs, 2 Pet, 482; Smith *et al.* vs. Swormstedt *et al.*, 16 Howard, 288; Bacon vs. Robertson, *et al.*, 18 How. 480; Dodge vs. Woolsey, 18 How. 331; Whitney vs. Mayo, 15 Ill., 251; Sweet vs. Hulbert, 51 Barb. 312.)

II. There are cases in equity, where it is not necessary to have all the parties in interest before the Court; as where the parties are very numerous, beyond the jurisdiction of the Court, or unknown. (Story's Equity Pleading, §§ 101, 102, 103, 116, 117, 157, 207, b., 216, note 2 to section 100; Egbert vs. Wood, 3 Paige, 517; Brown vs. Ricketts, 3 Johns. Chan. 553; Wiser vs. Blackly, 1 Johns. Chan., 437; Wakeman vs. Grover, 4 Paige, 22; Smith, *et al.* vs. Swormstedt, *et al.*, 16 Howard, 288; Dodge vs. Woolsey, 18 How., 331; Bacon vs. Robertson, *et al.*, 18 How., 480; Arkenburgh vs. Wood, 23 Barb. 360; Shephard vs. Wood, 13 Howard Pr., 47; McKenzie vs. L'Amoureaux, 11 Barb. 516; Zabriskie vs. Cleveland, Columbus & Cincinnati Railroad Co., 23 Howard, 395.)

R. T. Prewitt, for Respondents.

The plaintiffs do not show any such special interest in the subject matter of this petition as to authorize them to bring this suit. (Davis & Palmer vs. The City of N. Y., 2 Duer., 663; Same case, 1 Duer., 479; Doolittle vs. Supervisors of Brown Co., 18 N. Y., 155; Miller vs. Grandy, 13 Mich., 540; People vs. Regents, &c., 4 Mich., 98; 4 Mich., 187; State vs. Saline Co., 51 Mo., 350; Roosevelt vs. Draper, 23 N. Y., 318.)

The plaintiffs show no equity in themselves, or any special

injury to them, authorizing them to invoke the equity powers of this court. (State to use Connelly vs. P. G. R. R. R. Co., 32 Mo., 496; Sayre vs. Thompkins, 23 Mo., 443; Barrow vs. Davis. 46 Mo., 394; Lockwood vs. St. Louis, 24 Mo., 20; 1st Nat. Bk. of Hannibal vs. Meridith, 44 Mo., 500; Vitt vs. Owens, 42 Mo., 512.)

Williams, Jones & Eberman, for Respondents, cited: Saline County case, 51 Mo., 350.

Chandler & Sherman, for Respondents.

When a right common to all citizens of a municipal corporation is infringed upon or violated, or a wrong is committed against all said citizens, in common, the injury must be remedied by proper legal proceedings, instituted by the agent of the public or State. (Roosevelt vs. Draper, 23 N. Y., 318; Doolittle vs. Supervisors of Broome County, 18 N. Y., 155; 4 Kernan, 534; 4 Duer., 192; 14 N. Y; 2 Johnsons Ch., 428–9, and 433–4; 14 Eng. Ch. Rep., 123 and 613.)

Ewing, Judge, delivered the opinion of the court.

This was a petition in the nature of a bill of equity filed by the plaintiffs on behalf of themselves and all other citizens and tax-payers who are similarly interested with themselves to set aside an order of the County Court of Macon county making a subscription of $175,000, to the capital stock of the Missouri and Mississippi Railroad Co., and to have the same declared null and void, and to have the bonds issued to pay said subscription delivered up and cancelled. The bill alleges that plaintiffs were and are owners of a large amount of real estate and personal property situated in said county, and are tax-payers on the same; that in 1867 the County Court of Macon county subscribed $175,000, to the capital stock of said railroad company without the assent of two-thirds of the qualified voters of said county, no election regular or special having been held for the purpose of obtaining said assent; that bonds of said county have issued to the amount of said stock, &c.; that in order to raise more money for said road, the further sum of $175,000, was subscribed to the capital stock in 1870.

That said last subscription was the result of a corrupt and fraudulent combination and arrangement between the railroad company and the County Court, whereby the judges of said court were to derive large pecuniary gains and advantages; that bonds were issued by said court in payment of said subscription and placed in the hands of defendants, Bartholow, Lewis & Co., bankers, for the purpose of having them negotiated to innocent purchasers for value without notice of the fraud by which said railroad company had procured them. The bill further alleges the act authorizing said subscription is unconstitutional and void; that said subscription was made without authority of law, by collusion and in confederation with said railroad company and in fraud of the rights of the plaintiffs and other citizens and tax-payers of said county, for private advantages and gain and to subserve the individual purposes and ends of said justices of the County Court and other parties connected with them.

Defendants demurred to the petition on these grounds:

That the petition does not state facts sufficient to constitute a cause of action. There is a defect of parties plaintiff. There is a defect of parties defendant. Because plaintiffs do not show any such irreparable injury to themselves as to authorize the interposition of a Court of Equity. The court sustained the demurrer, the plaintiffs declining to file an amended petition, final judgment was rendered on said demurrer. The cause is here by appeal.

It seems not to be seriously questioned that upon the facts stated in the petition, which are of course admitted by the demurrer, the plaintiffs are entitled to the relief prayed for if they can maintain the action; and the only remaining question that we deem it proper to consider is, whether the plaintiffs as *tax-payers* of Macon county have stated a title for the relief which they claim against the defendants; in other words, whether as such tax-payers, they have such an interest in the subject matter of the suit as entitles them to maintain this action. I am not aware that this question has ever been passed upon by this court. In the case of Hooper vs. Ely, 46 Mo., 505, the

plaintiff as a *tax-payer* obtained an injunction against the treasurer to restrain him from paying a certain county warrant upon the ground that it was issued without authority of law, and also asked for an order upon the defendant, the holder, to bring it into court to be canceled. The only interest the plaintiff had in the subject matter of the suit was that of a *tax-payer* of the county, and his right to maintain it was unquestioned.

The only other case similar to the one at bar was that of Steines, *et al.*, vs. Franklin county, *et al.*, 48 Mo., 167, which was a petition in the nature of a bill in equity brought by the plaintiffs as citizens and tax-payers of Franklin county, asking for a decree declaring a contract and certain orders of the County Court of said county void, and requiring a cancelation and delivery of bonds issued under said contract and for an injunction restraining their payment, sale or transfer, and restraining the assessment, levy or collection of a tax for the purpose of their payment. No point was made as to the right of the plaintiffs as tax-payers to maintain the action.

The grounds upon which such suits by tax-payers have been held unmaintainable, are that it requires some individual interest distinct from that which belongs to every inhabitant of the town or county to give the party complaining a standing in court, where it is an alleged delinquency in the administration of public affairs which is called in question; and that the ownership of taxable property is not such a peculiarity as to take the case out of the rule; and that the only remedies against an abuse of administration power tending to taxation is furnished by the elective franchise or a proceeding on behalf of the State, or, in the case of an act without jurisdiction, in treating the attempt to enforce the illegal tax, as an act of trespass. (Denio, J. in Roosevelt vs. Draper, *et al.*, 23 N. Y., 318; see also Doolittle, *et al.*, vs. Supervisors, &c., 18 N. Y., 155.) The case of Roosevelt vs. Draper, *supra*, decided in 1861, is the latest decision on the subject in the Court of Appeals, to which our attention has been called. We have been referred, however, to a number of earlier decisions in the courts of that

State which hold a contrary doctrine—recognizing the right to maintain such suits; and they have been followed in several of the other states.

The first of these that will be noticed is the case of Christopher, *et al.*, vs. The Mayor, *et al.*, 13 Barbour, 567, which was a proceeding by injunction to restrain defendants from acting under a resolution of the board of aldermen relative to the rebuilding of a market. Held, that plaintiffs as tax-payers had such an interest as entitled them to the relief they asked; that as the necessary effect of the act complained of would be to impose a burden upon their real estate, they had an interest as certain and direct as that of a stock-holder in a moneyed or other corporation. So in the case of Milhau vs. Sharp, 15 Barb. 195, which was an application for an injunction to restrain defendants from constructing a railway in a certain street of the city of New York, the court say, plaintiffs being tax-payers to a large amount, have such an interest in preventing the grant in question from being carried into effect, that they had a right to institute the suit in their own names. To the same effect is Stuyvesant vs. Pearsall, *et al.*, 15 Barb., 244, in which it is held that the court on the complaint of a tax-payer may restrain parties from constructing railroads in the city—the granting of the right to construct which involved a breach of trust on the part of the corporation. In De Baun, *et al.*, vs. The Mayor, *et al.*, 16 Barb., 392, it was held that a person owning real estate in the city of New York and paying taxes on it, might prosecute an action against the corporation on behalf of himself and other tax-paying citizens to enjoin them from expending the money to be raised by taxation in repairing or paving a street in a manner contrary to an express law and tending to add to the taxes of the inhabitants. The same question came before the court again in the case of Wood vs. Draper, *et al.*, 24 Barb., 187—decided in 1857—and after a thorough review of the previous decisions in that court on the subject, the court say: "It must be regarded as the settled law of this court that it will grant its aid to restrain by injunction the imposition of any tax or burden on the tax-payers of this

city contrary to law on a complaint filed by any tax-payer on his own behalf as well as on behalf of others similarly interested." The correctness of these decisions has been questioned in some later decisions in that State which have been referred to. In Sharpless vs. The Mayor of Phila., *et al.*, 21 Penn. St., 147, the plaintiffs as property owners, and tax-payers of the city filed their bill to enjoin the Mayor from carrying into effect certain ordinances of the city which authorized subscriptions by the city to certain railroads. The right of the complainants to maintain the suit was unquestioned. In Mercer county vs. Pittsburgh & Erie Railroad Co., 27 Penn. St., 404, it is said, that as every taxable inhabitant is interested in all measures which increase the taxes he may apply for an injunction against abuses of that character. In a more recent case in that State, decided in 1868, Page, *et al.*, vs. Allen, 58 Penn. St., 338, a bill in equity was filed by plaintiffs, residents and tax-payers of Philadelphia, against the aldermen of the city to restrain them from exercising certain powers which it was alleged they claimed by virtue of a certain act of assembly known as the registry act, and charging that a large sum of money would be required from the city treasury to put the act into operation, which as tax-payers they were interested to prevent, and which would be wholly misapplied. The act being unconstitutional, the court say, the right of the plaintiffs to interfere on these grounds was not disputed, neither could it have been at any time since the decision in Sharpless vs. The Mayor, 21 Pa. St., 147, and Moers vs. City of Reading, *Id.*, 18 . In both it was conceded that the interest of a tax-payer where money was to be raised by taxation or expended from the treasury, was sufficient to entitle him to proceed in equity to test the validity of the law which proposed the assessment or expenditure. To the same effect is Mott vs. The Penn. Railroad Co., 30 Pa. St., 9.

The next case to which we refer, was decided by the Court of Appeals of Maryland, in 1869. (The Mayor and Council of Baltimore vs. Gill, *et al.*, 31 Md., 375–394–5.) This was a proceeding to restrain by injunction, appellants, The Mayor, *et al.*, from carrying out the provisions of an ordinance author-

izing the borrowing of money to build certain railroads, which was claimed to be unconstitutional. The complainants were tax-payers on real and personal property situated in Baltimore, and they sued in behalf of themselves and others similarly interested. It was maintained that the complainants had no standing in court, and were not entitled to ask the interposition of a court of equity to restrain by injunction the execution of the ordinance, even though it may have been passed in violation of the constitution. It was further maintained that the wrong complained of, was of a public nature affecting the whole public in which the Attorney General, as the representative of the State, was a necessary party. It was held that the interest of the plaintiffs as tax-payers, was sufficient to entitle them to maintain the action, and that the Attorney General was not a necessary party. Bartol, C. J., in delivering the opinion of the court, says: the case is to be distinguished from cases of public wrongs, in which the general public are alike concerned; that the complainants are tax-payers of the city, and others similarly situated constitute a class specially damaged by the alleged unlawful act, in the increase of the burden of taxation upon their property situated in the city. They have therefore a special interest in the subject matter of the suit, distinct from that of the general public. The court cites the cases of City of New London vs. Brainard, 22 Conn., 552; Webster vs. Town of Harwinton, 32 Conn., 131; and Merrill vs. Plainfield, 45 N. H., 126, as distinctly affirming the right of tax-payers to file a petition of this kind, but we have not access to the reports at present. To the same effect are the decisions in Iowa, see McMillan, *et al.*, vs. Lee County, 3 Iowa, 311; Collins vs. Ripley, County Judge, 8 Iowa, 129.

The question was before the Supreme Court of Illinois, in the case of the Board of Supervisors, &c. vs. Keady, *et al.*, 34 Ill., 293, but its consideration was waived by the plaintiffs in error, and the court expressed no opinion upon it, remarking that the question was undetermined in that State.

I have examined the cases cited in support of the other side

of the question, or such of them as we have had access to; and upon a careful consideration of the subject, I am of opinion that the decisions which affirm the right of plaintiffs, (or those standing in the same relation to such controversies) to maintain the action, rests upon a more solid foundation of principle and reason than those holding the contrary doctrine. And they are commended to our approval as furnishing the only adequate remedy to the injured party for wrongs resulting from unauthorized or illegal acts like those complained of. The injury charged as the result of the acts complained of is a private injury in which the tax-payers of the county of Macon are the individual sufferers, rather than the public. The people out of the county bear no part of the burden; nor do the people within the county, except the tax-payers, bear any part of it. It is therefore an injury peculiar to one class of persons, namely the tax-payers of the county of Macon.

I am of opinion that the action is well brought in the name of the plaintiffs as tax-payers, on behalf of themselves and all others who are similarly interested, and that the State is not a necessary party to the suit.

The judgment of the Circuit Court is reversed and the cause remanded. The other judges concur.

—o—

STATE *ex rel.*, EDWIN G. HAMILTON, Respondent, *vs.* ANDERSON B. EVERETT, *et al.*, Appellant.

1. *Practice, civil, Pleading—Mandamus, alternative writ of—Petition—Statement of case.*—In a petition for, and in the alternative writ of mandamus, the relator should so set forth the facts upon which he relies for the relief sought that the defendant may be able to take issue on them.

Appeal from Clay Circuit Court.

D. C. Allen & Samuel Hardwick, for Appellants, cited: Stephens on Pleading, p. 132, Ed. 1841, and rules in regard to Certainty; Chitty Pl. p. 233, Ed. 1859; Story's Equity Pleading, sec. 23; 7 Cowen, 51; 17 Mass., p. 237; 16 Mo., 168; 4 T. R., 490; 1 Greenleaf, § 528.

In consequence of the absence of dates, names, numbers and description of the fee-bills alluded to in the petition and writ,-a return to the writ is an *impossibility*. Thomas' Coke, 1st vol., p. 9.

John G. Woods, for Respondent.

There is no such pleading under the present practice as a demurrer to the petition or to the alternative writ of mandamus, but the issues are to be made up on the return to the alternative writ. (The State *ex rel.*, Adamson vs. Lafayette Co. Ct., 41 Mo., 545; Smith vs. St. Francois Co. Ct., 19 Mo., 433; Tap. on Mandamus, 337, Ensworth vs. Albin, *et al.*, 46 Mo., 450; Moses on Mand., 205 and 209.)

The petition in this case is a copy of that in Hopkins vs. Buchanan Co. Ct., 41 Mo., 254.

Vories, Judge, delivered the opinion of the court.

This was a petition for a mandamus filed by the said Edward G. Hamilton the relator in the name of the State against the respondents.

The petition states that the relator is the clerk of the Circuit Court of Clay County and was such clerk at the time of the rendition of the services in the petition named and set forth in the fee-bill filed; and that O. T. Moss was then the sheriff of said County and John G. Woods was the Circuit Attorney. That at the September term of said Circuit Court A. D. 1871 a large number of indictments were returned by the grand jury to said Court against Charles J. J. Leopold, Theodore Leopold and various other persons or parties for selling liquors without license. That said indictments were each indorsed a true bill and signed by the foreman. That process was ordered and issued thereon and served by the Sheriff. That at the January term 1872 of said court, Charles J. Leopold and Theodore Leopold appeared and plead guilty to the offense charged in the indictments. That said pleas were entered in one case against each of said parties and that the remainder of said cases were, with the permission of the Court, dismissed by said circuit attorney by agreement with defend-

ants, at their costs, and judgment was rendered accordingly; and that executions were issued thereon, but the same could not be collected. That the defendants were arrested and released by said court under the insolvent debtor's act. That fee-bills were thereupon made out and presented to the judge and circuit attorney and were by them duly examined and certified to the County Court of Clay County for payment in conformity to the Statute in such case made and provided. That all of the services charged in said fee-bills were rendered by the officers in discharge of their duties. That a copy of one of said fee-bills is herewith filed and asked to be made a part of the petition. That said County Court of Clay County refused and still refuses to allow said bills and order payment of the same or any part thereof. That Anderson Everett, Thomas M. Wilson and Thomas J. Gunn are the Justices of the said County Court.

The petition then prays for an alternate writ of mandamus against said Justices, returnable forthwith, requiring them to pay *said fee-bills* or show cause why a peremptory mandamus compelling them to do so should not be issued.

The record states that an alternative writ was issued and executed by the Sheriff on the 13th day of November, 1872, but no writ is set forth or copied in the record; but the case seems to be treated in this court by both parties as an ordinary case where a petition is filed by the plaintiff, and demurred to by the defendants. The writ should regularly be here. It is the alternative writ and not the petition that the defendants were required to answer or make returns to. (W. S., 924, § 1.) But as both parties seem to treat the petition and writ as one thing, the appellant setting forth the petition as it appears in records and making his objections to that, while the respondent sets forth what he calls, and what purports to be the writ, and relies on that. And inasmuch as the allegations in each are substantially the same, I will consider the case as though the writ was set forth in the record, and identical in its allegations with the petition. In fact the petition and writ in all of their material allegations should be the same.

On the same day that the writ is stated to have been issued the defendants appeared and demurred to the writ: the demurrer is entitled, "a motion to quash the writ." But it proceeds by stating that the defendants appeared and filed their demurrer to the petition and writ, &c.

Among other causes of demurrer by the defendants, are the following:

"There is a defect of parties plaintiff, in this, that it is at the relation of E. G. Hamilton, and relief is sought also for O. P. Moss and John G. Wood."

"Because it is not shown in the petition or writ that the fee bill filed with the same, is a fee bill in a case against Charles J. J. Leopold, wherein he was sentenced to imprisonment in the county jail and to pay a fine, or either of these modes of punishment, and is unable to pay them."

"Because it is not shown in the petition or writ how many fee bills there were presented to said County Court, for auditing and payment, and defendant cannot therefore make good issues upon the allegations in said writ; nor is it shown how many indictments were returned by the grand jury against said Leopold, and said other parties; nor is it shown who those other parties were."

"Because the allegations in the petition and writ are vague and uncertain, and convey no sufficient or definite information to these defendants."

"Because fee bills in all of the cases alleged to have been presented for audit and payment to said County Court, were not filed with the petition, nor sufficiently identified with petition or writ to enable this court to ascertain the same with certainty."

There are other causes of demurrer stated which bring in question the legality of the fees charged, &c., but it is not necessary to notice these questions in this case, as the most of these questions are brought more directly in issue in a case from Ray County, which will be decided at this term of the court.

The fee bill filed as an exhibit with the petition, which should have been copied with the petition, is as follows:

State of Missouri vs. C. J. J. Leopold, selling liquor without license.

Fees E. J. Hamilton, clerk.

To indictment, 50, filing, 05, capias, $1,	$1 55
2 spa's. and filing, 60, order, 15, judgment 50,	1 25
2 executions,	2 00
Bill of cost, 75, copy, 50,	1 25
Fees O. P. Moss, Sheriff.	
To executing capias, $1, bond, 50,	1 50
Serving 2 Spa's. $1, *non est* on one, &c., 50,	1 50
Executing one execution,	1 00
Commitment,	1 00
Fees of J. G. Wood, Cir. Atty.,	5 00
	$16 50

The demurrer was heard by the court and overruled; the defendants failing to further answer, the court rendered judgment against them as follows:

"It is therefore ordered by the court that a peremptory writ of *mandamus* issue against the defendants aforesaid ***as prayed for in said petition***, and that plaintiff recover of defendants all costs in this behalf expended."

To the opinion of the court in overruling the demurrer, and in giving final judgment against defendants they excepted.

Motions for a new trial, and in arrest of judgments were also filed and overruled, and the defendants excepted.

It will only be necessary to examine a few questions in this case; the question as to the legality of the fees set forth in the fee bill filed with the petition I have already stated will not be examined.

The case is not presented in a very regular form. I think that the regular course to pursue, when the alternate writ and petition is defective, would be to make a motion to quash the writ. But in the case of State, *ex rel.* Adamson vs. Lafayette County Court, (41 Mo., 545,) a demurrer was filed to the petition and writ, and was passed on by the court without ob-

jection, and as the same end is reached in either case, I suppose it makes but little difference by what name the paper filed is called; the object being in either case to object to the sufficiency of the petition and writ, and the parties so treated the demurrer in this case, and it is therefore too late to object to the mode of objection to the petition and writ in this court. (Ensworth vs. Albin, *et al.*, 46 Mo., 450.)

The appellants object to the petition and writ, because they say that there is a defect of parties plaintiff. That relief is sought as well for Moss and Wood, as for the relator. I do not think that this objection is well taken; there is no defect of parties plaintiff; if there is any objection to the petition on this ground, it would only go to that part of the costs due to Moss and Wood, the allegations as to them would be stricken out as surplusage, and then the petition would be proper in that respect. It could only amount to the statement of irrelevant matter in the petition, if it could be called an objection at all.

The other objections made to this petition and writ have more force. In the alternative *mandamus* and the petition the relator should set forth the facts upon which he relies for the relief sought. The defendants should have the facts before them, so that they could either admit or deny them, or take other issues on the facts stated constituting the plaintiff's right to the relief required.

If the petition and writ are defective in these particulars, the usual course is to move to quash, but this case as before stated, has been treated by the parties in the light of an objection to the sufficiency of the petition and writ, no objection having been made in the court below, as to the form of the objection. (Commercial Bank of Albany vs. Canal Commissioners &c., 10 Wend., 25; People *ex rel.*, Lorillard vs. Supervisors, &c., 15 Barb. N. Y., 607.) The petition and writ in this case state that a *large number* of indictments were returned against Charles J. Leopold and Theodore Leopold, and *various other parties*, for selling liquors without license, &c. That writs were issued on them, &c., and that judgment

had been rendered against them for costs, and that cost bills had been made out and allowed by the judge of the court and circuit attorney, where the indictments were pending, and that defendants refused to audit and pay the bills. He files one bill of cost with his petition for sixteen dollars, which it will be seen from the above authorities, could not be taken as part of the writ.

How was it possible for the defendants to make proper and intelligent issues on these allegations, how could it be denied that various indictments had been pending, &c.? It seems to me that no intelligent issues could be made on such pleadings, and that when the demurrer was overruled, the court could render no intelligent judgment on the petition. The judgment rendered by the court is just as general and indefinite as the petition and writ, the peremptory *mandamus* in this case was ordered *as prayed for in* the petition. Now how will the defendants obey this writ? They are required to audit and pay a large number of cost bills against the Leopolds, and against various other persons. Even if the cost bill filed is to be taken as part of the petition, then the only judgment that could have been intelligently rendered, would have been a peremptory mandamus requiring the defendants to pay the amount of that particular bill.

The relator in this case however, claims that the demurrer admits the facts stated in the petition. That is true, it admits all facts well pleaded, but when a pleading is so uncertain that no intelligent judgment can be rendered on it, when admitted, the admission amounts to nothing. The relator further claims in this case that the petition is identical with the one in the case of "The State, *ex rel.* Hopkins vs. The Justices of the Buchanan County Court, 41 Mo., 254." By an examination of that case it will be found that the petition only claimed costs for services rendered by himself in one case, and particularly described the case, and the fee bill that the justices of the County Court refused to audit and pay. No question was made; as to the sufficiency of the petition or writ but the case was submitted on an agreed state of facts; no alterna-

tive writ was ever in fact issued. There is nothing in that which can be of any authority in this, because there is but little analogy between the cases. The judgment in that case was for a single bill of costs which was described in the petition.

The petition and writ in this case are too uncertain, as well as the judgment rendered by the court. The judgment being rendered, and the peremptory mandamus issued requiring the defendants to pay bills which are wholly undefined either by the number of fee bills required to be paid, or by any other description, I think the same ought to be reversed.

The other Judges concurring, the judgment of the Circuit Court is reversed, and the cause remanded.

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SILAS W. SKINNER, Appellant, *vs.* JAMES E. PURNELL and MARY A. PURNELL, Respondent.

1. *Land and land titles—Vendor's lien—Taking other security—Fraud.*—When a purchaser by fraud induces the vendor to take worthless security for the unpaid purchase money for land, the vendor does not thereby waive his lien on the land.

Appeal from Clinton Circuit Court.

Porter and Turner, for Appellant.

The facts stated in the petition show the existence of a lien against the property sought to be charged. (Wash. on Real Prop., Vol 2, pp. 86, 87, 88; Story Eq. Jur., §§ 1217, 1218, 1219; Delassus vs. Poston, 19 Mo., 428; Marsh vs. Turner, 4 Mo., 253.)

John G. Woods, for Respondent.

EWING, Judge, delivered the opinion of the court.

The petition alleges in substance the execution of a note by defendant J. E. Purnell, in December, 1870, for $300, to plaintiff for a part of the purchase money of certain real estate sold by him to said Purnell, and conveyed by direction of said Purnell to his wife Mary A. Purnell; that at the time said

property was conveyed, defendant J. E. Purnell made false and fraudulent representations as to his ownership of certain other real estate in Kansas City, and that his title thereto was perfect and the property free from incumbrance; that by reason thereof plaintiff was induced to convey the property, sold by him to defendant said J. E. Purnell to his wife Mary A. Purnell, and to accept as security for said notes a deed of trust on said property in Kansas City; that said Purnell did not own said property or any interest therein, which he, Purnell knew; that he was persuaded not to examine the records as to the title to said property by reason of the assurances and representations of said defendant in regard to the title and condition of the property, and that he was plaintiff's legal adviser at the time the transaction took place. Defendant Mary A. Purnell demurred to the petition on the following grounds:

1. Several causes of action are improperly united in the same count, with a single prayer asking both legal and equitable relief.

2. The petition alleges that the defendant is a married woman, and is brought to recover a judgment against her husband, and at the same time seeks to bind her property for the paymet of the debt.

3. That the petition does not state facts sufficient to constitute a cause of action against this defendant.

4. The petition seeks to charge her property on the ground of fraud in the original contract, but does not charge that she was a party to or in any manner connected with the fraudulent contract.

The demurrer was sustained. The record discloses some irregularities in reference to a non-suit after the demurrer had been sustained; but the ruling of the court upon the demurrer only will be considered.

Even if it be conceded that the taking of the deed of trust on other real estate would have had the effect of waiving the implied lien, had the transaction been free from fraud, has the plaintiff lost his lien by taking this security, if it was worthless and known to be so by the purchaser Purnell, who fraudu-

lently represented it to be good? That he has not, is a proposition too clear to admit of discussion. Indeed this point is not particularly urged by counsel.

Mrs. Purnell is a proper party to the action for obvious reasons. The property was conveyed to her by the plaintiff at the request of her husband and she holds the legal title. She is a volunteer; and stands in no other or different relation to the plaintiff, as it respects any claim she has to the property than would Purnell, her husband, had the title been made directly to him.

She takes the property affected with his fraud and subject to all the equities which would have attached to it in his hands.

The lien of a vendor attaches against the vendee, and all persons claiming as volunteers, and purchasers under him with notice. (2 Story Eq., 1225; 2 Wash., Real Prop, 88.)

The object of the suit being to enforce the plaintiff's lien as vendor, it was unnecessary to ask for judgment specifically for the amount of the note in addition to the other relief prayed. For under the prayer of the petition, there should be judgment against the defendant J. E. Purnell for the amount of the purchase money, as well as a decree for the sale of the property subject to the lien. So that this part of the petition may be regarded as surplusage, and the petition treated as a proceeding in equity.

The judgment is reversed and the cause remanded. The other Judges concur.

—o—

JANE D. CRENSHAW, Plaintiff in Error, *vs.* JACOB CREEK, *et al.*, Defendant in Error.

1. *Dower—Married woman not estopped from claiming, when.*—The fact that a married woman was made a party to the record in suit for the partition of lands of her former husband, and for the assignment of her dower therein, will not estop her from afterward denying and contesting the validity of those proceedings.

Error to Clay Circuit Court.

Samuel Hardwick, for Plaintiff in Error.

I. The fact that dower was allotted to plaintiff does not estop her from asserting her right. (Thompson vs. Renoe, 12 Mo., 157.)

II. There are none of the elements of an estoppel in this case. To constitute an estoppel, there must be an admission inconsistent with the claim set up, which misled the other party. (Taylor *et al.*, vs. Zepp, 14 Mo., 482; Newman vs. Hook, 37 Mo., 207; Parker vs. Barker, 2 Met., 423; Gray vs. Bartlett, 20 Pick, 186; Knowlton vs. Smith, 36 Mo., 507.)

III. Mrs. Crenshaw having acted by mistake and in ignorance of her rights, and no third parties intervening, a court of equity will grant relief. (1 Sto. Eq., §§ 121, 122, 130, 131, 134; Sto. on Cont., 409; Wheadon vs. Olds, 20 Wend., 174; Haven vs. Foster, 9 Pick, 112; Wiser vs. Blachly, 1 Johns. Ch. 607; Rosevelt vs. Dale, 2 Cow., 129.)

D. C. Allen and J. Chrisman, for Defendants in Error.

More than eight years had elapsed since the rendition of the judgment, assignment of dower, and sale of lands made in the partition, before the bringing of suit Aug. 30th, 1869, and so far as appears from the petition, plaintiff knew her alleged rights during the entire time intervening, and she makes no explanation excusing her laches. The laches of plaintiff in the premises are gross, and bar any right of action she may have had, independent of the statute of limitations. "He who seeks the aid of a court of equity, must assert his claim with reasonable diligence." (Kerr on Fraud & Mistake, p. 303, 304; Jones vs. Turberville, 2 Ves. Jr., 11; Badger vs. Badger, 2 Wall., 87.)

WAGNER, Judge, delivered the opinion of the court.

As the court sustained a demurrer to the petition it will be necessary to examine the same and see whether it stated facts sufficient to warrant a judgment for the plaintiff.

In substance it is alleged that before 1859, plaintiff was the

wife of one Abraham Creek, who died during that year; that during their coverture she and the said Abraham became possessed in fee simple as husband and wife, of a joint estate in the lands in said petition described; that Abraham died and she was entitled to the same in fee simple by survivorship; that she and one Braly administered upon said Abraham's estate; that Braly exercised almost exclusive control over the estate, and that all her information in relation to the same was derived from him; that Braly inventoried the land as the property of said Abraham; that she married a second husband Crenshaw and ceased to have any further control over the estate, when Braly took entire control.

That while so acting said Braly employed counsel to make disposition of said real estate on behalf of the estate of the said Abraham; representing to the counsel that said Abraham was possessed in fee simple of the lands, and directing him to proceed and have the dower of the plaintiff set apart, and the remainder sold for purpose of partition; that she had nothing to do with directing the counsel nor any information as to what her rights were in the land; that suit was instituted making plaintiff and her then husband together with others, heirs of the said Abraham, plaintiff, and Boggens who purchased the land at the partition sale and his wife, who was a daughter of the said Abraham Creek, defendants.

This petition contained the usual and ordinary averments of a petition for partition, and to set apart dower. The defendants entered their voluntary appearance, and judgment was rendered by consent. A part of the land described in the petition was assigned to plaintiff as dower. The court then ordered the remainder of the land to be sold in partition, and at the sale Boggens and Stevenson who were interested parties and were fully advised of the rights of the plaintiff, became the purchasers.

It is further averred that they were not in any wise misled on account of any act or representation of the plaintiff.

It is further alleged that no final disposition of said cause in partition has yet been made, and the prayer is that the said proceedings be set aside and for other relief, &c.

I cannot imagine on what ground the demurrer was sustained, unless the view was taken that the plaintiff was estopped from denying the validity of the proceedings which resulted in the assignment to her of dower and the sale of the remainder of the land in partition, she being a party to the record.—But it must be borne in mind that during this time she was a married woman, and the facts disclosed are not sufficient to warrant an estoppel in this case.

In Thompson vs. Renoe (12 Mo., 157,) it was expressly held by the court that when a widow claims land in her own right, the fact that dower has been allotted her does not estop her or those claiming under her from asserting such rights. In the case just referred to it appears that the widow was unacquainted with what were her real rights and acquiesced in the allotment of dower. Yet it was adjudged that neither she nor her heirs were barred or concluded. In the case of Hempstead vs. Easton, (33 Mo., 142,) it was decided, that the recitals in a deed, by which a married woman purported to convey her title to land, did not estop her nor those claiming under her from asserting the truth against the recitals. In Glidden vs. Strupler, (52 Penn. St., 400,) a married woman by agreement contracted to sell land; she received one year's interest and a small part of the purchase money. The purchaser took possession and made improvements with her knowledge and encouragement, and the court held that neither the principle of estoppel nor compensation would prevent her recovering the land. It is manifest that in the proceeding for partition and in the matter of the allotment of dower the court acted under a misapprehension of law in reference to the legal title to the land. That the plaintiff's name in conjunction with her husband was used as a party to the record cannot impair her right or prevent her from asserting her title. She avers pointedly that she neither encouraged nor induced any party to change his condition in the premises, and that the other parties and the purchasers possessed the same knowledge that she did. Under the circumstances of this case there is certainly no rule of law which would prohibit her from maintaining her suit for the as-

sertion of her rights. If the matters set forth in the petition are true, very little difficulty will be encountered in the final disposition of this cause as no final judgment has yet been had in the partition suit.

Wherefore, I am of the opinion that the judgment should be reversed and the cause remanded. The other Judges concur.

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ALBERT P. HYERONIMUS, Respondent, *vs.* JAMES W. ALLISON, Appellant.

1. *Arbitration, statute concerning—Equitable defenses—Partiality of arbitration.*—Where A and B submitted their dispute to arbitration under the statute an award was made, but no attempt appears to have been made to procure a judgment on the award, and suit was brought upon the award within two months after it was made, and the defendant alleged in his answer the prejudice of one of the arbitrators, unknown to him at the time of the submission.—Held, that the allegation was a good equitable defense.
2. *Arbitrations—Partiality—Courts of equity.*—Courts of equity will relieve against the partiality or corruption of arbitrators, especially under the statute of this State.
3. *Arbitration—Statute, motions under—Loss of papers—Award, suit on*—Where the papers containing the submission and award were destroyed and no opportunity apparently afforded defendant to move to vacate the award, Held, the defendant's answer to a suit on the award, might well be treated, as in the nature of such motion, or as objections upon a motion to confirm.

John G. Woods and Horatio F. Simrall, for Respondents.

The partiality, or prejudice of an arbitrator must be taken advantage of by a motion to vacate the award, (W. S., p. 144, §§ 9, 11,) and cannot be shown in defense to an action on the award. (Wats. on Arb. Marg., pp. 153, 224; Billing on Awards Marg., p. 283; 1 Saund., 327, N. 3; 8 East., 244; 2 Phil., Ev., 107, Wills vs. Maccarmick, 2 Wils., 148; Morewood vs. Jewett, N. Y. Supr. Ct., 2 Rob., 496.)

J. E. Merryman and Samuel Hardwick, for Appellant.

It is the duty of the court to scrutinize closely the partiality of the arbitrators. (Strong vs. Strong, 9 Cushing, 560.)

If one of the arbitrators is partial the award will be vacated. (W. S., 144, Toler vs. Hayden, 18 Mo., 399.)

SHERWOOD, Judge, delivered the opinion of the court.

This was an action brought in the Clay Circuit Court by Hyeronimus against Allison, to recover the amount of an award made on the 26th day of October, 1871, in favor of the plaintiff for $640, on account of damages alleged to have been done the cattle of plaintiff by the introduction by defendant of Texas cattle into the county. The petition in substance charges that a submission in writing was made and entered into by plaintiff and defendant whereby they submitted to three arbitrators, by them chosen, the matters of difference arising out of the death of plaintiff's cattle from Texas fever, alleged to have been communicated to them by the cattle of defendant unlawfully brought by the latter into the county of Clay; that by the terms of said submission it was agreed that the award should be made a judgment of the Clay Circuit Court, provided a copy of the award should be made and furnished to both parties prior to December 1st, 1871; that the arbitrators so selected met, and after hearing the evidence of both parties, found in favor of plaintiff on the said 26th day of October in the sum of $640, and furnished both parties with a copy of the award, on the day on which the same was made; that said submission and award were destroyed by fire, and that defendant had refused to pay the sum so awarded, &c., &c.

Defendant in his answer admits the submission to arbitrators and the award made, and the destruction of the papers by fire, but claims that such submission was by virtue of the laws of this State, giving the right to either party to file exceptions; that said award was not binding on defendant because of the prejudice of Garthe, one of the arbitrators; the fact of which prejudice was unknown to defendant at the time of the reference was held, and the award made; that plaintiff's cattle did not die of Texas fever, &c. The answer concludes with a prayer that the award "be disregarded." The court on motion of the plaintiff struck out all that portion of defendant's answer,

commencing with the allegation that said award was not binding, except that portion which charges Garthe to have been prejudiced; and to this ruling defendant excepted.

The plaintiff then filed his replication, denying the prejudice of Garthe, "and that the same was unknown to defendant at the time of the reference aforesaid"—thereby admitting in effect the fact of such prejudice.

It does not any where appear at what time the destruction of the papers occurred, or that plaintiff ever attempted to have judgment rendered upon the award; but the suit was brought on the award on the 23d day of December, less than two months after the same was made.

A trial was had before the court, and testimony was introduced on behalf of defendant which clearly showed the prejudice and partiality of Garth, the arbitrator, and strongly tended to show that the plaintiff was cognizant of such partiality and prejudice and sought by concealing his knowledge in this particular to obtain an undue advantage. Garth himself was introduced by plaintiff as a witness, and defendant objected to his testifying on the ground that being one of the arbitrators, he was incompetent as a witness to either sustain or impeach his own finding. This objection was overruled, Garth permitted to testify and defendant excepted.

The testimony of Garth is very unsatisfactory as to his expressions prior to the reference, respecting the plaintiff's right of recovery, and in regard to defendant's liability; and without explanation his want of recollection as to his indications of preference in behalf of plaintiff, which he is charged with having made, might have a tendency to excite suspicions of his bias and unfairness when acting as arbitrator.

In the view which I take of this case, it is wholly unnecessary to pass upon the various declarations of law given on the part of plaintiffs and refused on that of defendant.

Garth's statements are so vague and indefinite as not to require the expression of any decided opinion as to the competency of an arbitrator to testify respecting the matters pertaining to the arbitration. The answer of the defendant al-

though inartificially drawn sets up an equitable defense.

Courts of equity will relieve against the partiality or corruption of arbitrators. (Newland vs. Douglas, 2 Johns, 62; 2 Sto. Eq., § 1452.)

In Strong vs. Strong, 9 Cush., 560—a very elaborate and exhaustive opinion—it is held that "an award may undoubtedly be impeached and avoided by proof of fraud, provided it be fraud practiced upon or by the referees." And the court then further says. "The great prevalence of arbitration in modern times, while it has led the courts to adopt more liberality of construction regarding defects of mere form or honest ends, has at the same time been followed by more strictness of judgment as to the character and conduct of arbitrators in the relation of impartiality and integrity both in equity and the common law tribunals. * * * * If parties really intend to have their rights decided by impartial judges, they are entitled to insist that each and all of them be impartial. Therefore, proof of bias and strong partiality on the part of an arbitrator, would form a serious objection to the acceptance of the award.

It would be no valid answer to the objection, that such referee did not discover undue partiality in the deliberations of the referees, and made no unusual exertion to influence their minds, because it is impossible to determine to what extent their judgment might have reposed on his reasonings and suggestions, or how far their decisions were influenced by him." If the mind of an arbitrator be tainted by partiality, he manifestly would be guilty of a ***gross fraud*** in concealing such bias, of which he must be conscious at the time he is chosen. A court of equity, which narrowly watches every appearance of unfair dealing and repudiates every transaction which bears the dark impress of fraud, would be recreant to the principles on which its very jurisdiction rests to permit an award made under such circumstances to stand.

And our statute respecting arbitration and references, exhibits strong marks of legislative solicitude, that the arm of a court of equity in this regard should not be shortened, for section 23 of the act referred to, provides: "Nothing contained in

this chapter shall impair, diminish or in any way effect, the authority of a court of equity over the awards of arbitrators or the parties thereto." So that authorities which might otherwise be pertinent as showing, under different statutory regulations, a preclusion of equitable interference in cases of this sort, have no applicability when a statute such as ours is in force.

But inasmuch as the papers which contained the submission and award were destroyed, and no opportunity appears to have been afforded defendant to move to vacate the award, his answer might well have been treated as in the nature of such motion, or as objections upon a motion to confirm.

And partiality is one of the statutory grounds for the vacation of an award. So whether we regard the answer as a *legal* or as an equitable defense, the court clearly erred in giving judgment upon the evidence in favor of plaintiff.

The judgment is reversed and the cause remanded. The other Judges concur.

STATE OF MISSOURI, Appellant, *vs.* WESLEY R. LOVE, Respondent.

1. *Practice, criminal—Appeals—Final judgments—Demurrers—Indictments.*—Where a demurrer to an indictment is sustained, but no final judgment is given on the demurrer, an appeal will be dismissed.

Appeal from Linn Circuit Court.

Daniel Metcalf, for Appellant.

Geo. W. Easley, for Respondent,

There is no final judgment from which an appeal will lie. (State vs. Gregory, 38 Mo., 501.)

ADAMS, Judge, delivered the opinion of the court.

This was an indictment under the statute concerning false pretenses. A demurrer was sustained to the indictment, but no final judgment was rendered on the demurrer. In-

stead of rendering final judgment the court ordered the defendant into custody to abide the further action of the grand jury then in session.

There being no final judgment, the appeal will be dismissed. (See State vs. Gregory, 38 Mo., 501; 2 W. S., 1114, § 14; State vs. Martindale, 51 Mo., decided February Term, 1873.)

Appeal dismissed. The other judges concur.

THE END OF FEBRUARY TERM 1873, AT ST. JOSEPH.